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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 491

E. E. MORGAN,
Petitioner,

vs.

UNITED STATES FIDELITY & GUARANTY COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

CHARLES CLARK
1741 Deposit Guaranty Bank Building
Jackson, Mississippi
VARDAMAN S. DUNN
1741 Deposit Guaranty Bank Building
Jackson, Mississippi
Attorneys for Petitioner

Of Counsel:
COX, DUNN & CLARK
1741 Deposit Guaranty Bank Building
Jackson, Mississippi

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, HArrison 1-3030

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UNITED STATES FIDELITY & GUARANTY COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

E. E. Morgan respectfully petitions the Court to grant a writ of certiorari to the Supreme Court of Mississippi to review a decision by that Court which denied to Petitioner rights, privileges and immunities he specifically claimed under the Fifth and Fourteenth Amendments to the Constitution of the United States.

EXPLANATION OF RECORD

The certified record is extremely bulky and only a small portion is relevant to the narrow constitutional questions here presented. Accordingly, pertinent excerpts have been reproduced in an addendum to this petition.

OPINIONS BELOW

The opinion of the Chancery Court of Hinds County, Mississippi is not officially reported. The opinion of the Supreme Court of Mississippi is reported as *E. E. Morgan v. United States Fidelity & Guaranty Company*, 222 So.2d 820. These opinions are appended (Addendum A and B).

JURISDICTION

The Supreme Court of Mississippi entered its judgment on April 14, 1969 (Addendum C). A petition for rehearing was filed and denied by order entered on June 9, 1969 (Addendum D). Jurisdiction of this Court is invoked under 28 *U.S.C.* 1257 (3).

QUESTIONS PRESENTED

1. In a civil action, in the nature of a judgment creditor's bill, may an individual judgment debtor be interrogated under oath as to alleged concealment of assets, when concealment would be a criminal offense, despite the debtor's timely constitutional claim of the right to remain silent on the ground that his answers could tend to incriminate?[1]

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1. In the area of self-incrimination, the questions presented relate exclusively to an enforced testimonial discovery under oath directed against an individual, as distinguished from the seizure of books or records, either individual or corporate which is not here involved.

2. Is the interest of the State judiciary in the enforcement of a private money judgment a sufficient "public policy" consideration to override the constitutional privilege against forced testimonial self-incrimination?

3. May the Fifth Amendment privilege be denied by the device of prospective "waiver" in virtue of an incidental promise in a purely private contract document, especially where, as here, the promise (a) is given several years before the occasion arises for specifically claiming the privilege and (b) is merely one contained in a printed bond application form, which, in general terms, extends only to furnishing routine "financial statements" on request?

4. When a judgment debtor is exposed to being held in criminal contempt for concealment of assets in violation of a mandatory transfer injunction, can a waiver of the privilege against self-incrimination be constructed out of a purely private contract promise made long *prior* to the passing of the injunctive law under which prosecution could result?

5. Is substantive and procedural due process accorded to an individual judgment debtor when the judgment creditor is appointed general receiver and granted "broad visitatorial and inquisitorial powers" in the form of active adversary pursuit of the debtor, without making provision for any right for the debtor to be heard in relation to the conduct of the receivership?

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States: Amendment 5:

> "No person . . . shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Constitution of the United States: Amendment 14:

"Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

A.

Federal Questions Were Timely and Properly Raised

Petitioner, as defendant in the trial court and as appellant on appeal, specially claimed the rights, privileges and immunities vouchsafed to him under the Fifth and Fourteenth Amendments by (1) pleadings filed in the trial court (R. 48-52, 520-527, 628-629), and (2) exceptions filed in the trial court to those portions of the Decree involving alleged constitutional violations (R. 1181-1184, Addendum E), and (3) assignments of error filed in the Supreme Court of Mississippi on appeal (Addendum F), and (4) assignments of error filed in the Supreme Court of Mississippi on petition for rehearing (Addendum G). All pleas were rejected by orders of the trial court and by the decision and order of the appellate court. The details of the methods of raising the federal question and of the way in which they were passed upon are covered in the Statement below.

B.

Summary of Reasons for Granting Writ

The State Court has decided federal questions of substance not heretofore determined by this Court and in a way which is not in accord with applicable decisions of this

Court, and the State Court has misapplied the cited decisions of this Court and the Federal Courts of Appeal.

Specifically, the State Court, without precedent and contrary to the applicable Federal decisions:

(1) Has declined to respect a Fifth Amendment plea in a proceeding for discovery in aid of a judgment creditor where such enforced discovery could tend to incriminate; and

(2) Has expressly cast the constitutional privilege against self-incrimination in doubt on the ground that to respect the privilege would serve to evade a civil judgment or impair the Court's collection powers; and

(3) Has found a "waiver" of the properly claimed Fifth Amendment privilege prospectively in virtue of a purely private contract given long prior to the advent of the occasion for invocation of the privilege; and

(4) In reaching its "waiver" decision, has misapplied and misconstrued *Zap* v. *United States* (1946), 328 U.S. 624, 66 S.Ct. 1277, 90 L.Ed. 1477, and has erroneously read and followed *United States* v. *Field* (CA 2, 1951), 193 F.2d 92,[2] which has been twice contradicted by the same Court and which has been rejected by this Court in *Curcio* v. *United States* (1957), 354 U.S. 118, 77 S.Ct. 1145, 1 L.Ed.2d 1225.

The State Court has wholly disregarded the federal rule expressed in such cases from this Court as *United States* v. *The Saline Bank of Virginia* (1828), 1 Pet. 100, 7 L.Ed. 69, and *Arndstein* v. *McCarthy* (1920), 254 U.S. 71,

2. This case was relied upon by the Chancellor, but is not cited to the Supreme Court's opinion. However, it is the only case involving a constitutional issue cited by Wigmore which, in turn, is cited by the Supreme Court as its authority for the waiver holding.

41 S.Ct. 26, both holding that a civil court may not compel discovery of assets where concealment is a criminal offense and when no immunity from prosecution has been granted.[3]

Especially critical to the public interest is the prospective waiver-by-contract question. If the decision stands, all commercial contracts may permissively contain a stereotyped waiver clause requiring individual abandonment, in advance, of the right to claim the privilege in the future. When this occurs, as one eminent judge has observed, "the sole practical effect of the constitutional privilege will be to add a few words to a contract. . . . Before long, rubber-stamped out of existence, the privilege will be but a quaint item of antiquarian lore."[4] The present decision does not even guarantee the forewarning of an express reference to the privilege, but allows waiver by implication from a

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3. It is apparent that in every step of the suit, the facts required to be discovered would place Petitioner's liberty in jeopardy. If he obeys the order and makes a testimonial confession that he has transferred or concealed assets, he may be imprisoned for larceny or other criminal offenses. If he continues to decline to incriminate himself, he will have violated the disclosure order and will be exposed to imprisonment for contempt. This Court has expressed its "unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt." *Murphy* v. *Waterfront Commission of New York Harbor* (1964), 378 U.S. 52, 84 S.Ct. 1594, citing *United States* v. *The Saline Bank of Virginia*, supra.

This choice between the "rock and the whirlpool" serves, in effect, to deny to individual litigants the protection of the Fifth Amendment privilege which is "intended to relieve claimants of the necessity of making a choice between incriminating themselves and risking serious punishments for refusing to do so." *Albertson* v. *Subversive Activities Control Board* (1965), 382 U.S. 70, 86 S.Ct. 194 (86 S.Ct. at 197).

4. See opinion of the late Judge Jerome Frank, dissenting in *United States* v. *Field* (CA 2, 1951), supra (193 F.2d at 107). Cf. the cited case of *Pope Mfg. Co.* v. *Gormully* (1892), 144 U.S. 224, 12 S.Ct. 632, 636, discussing the invalidity of prospective, as distinguished from retroactive, waiver by contract in such areas as usury, the statute of limitations and other rights affected by public policy. (Other examples are noted by Judge Frank [193 F.2d at 108]). *Pope* states: "There are certain fundamental rights which no man may barter away, such, for instance, as his right to life and personal freedom. . . ." (12 S.Ct. at 636).

routine promise to furnish a financial statement if requested in the future. Not once before or since the above quoted words were written in 1951, until now, has any reported case, state or federal, imposed a waiver in advance by the device of a private contract document.

C.

Statement

The issues arise in a State Chancery Court civil action called a "Judgment Creditor's Bill." The Respondent, United States Fidelity & Guaranty Company, had precedently secured a money judgment of some $3,000,000.00 against Petitioner, E. E. Morgan, and several others on account of accumulated bond losses on several construction projects undertaken by one Hyde Construction Company, Inc., bonded by the United States Fidelity & Guaranty Company and indemnified by Morgan. The Bill (R. 6-30) sought specific performance of an undertaking found in one of several bond applications for the furnishing of financial statements on request, including a testimonial discovery under oath of the nature, location and disposition of assets covered by the judgment lien on a charge that (R. 11-12):

> ". . . Said judgment has been duly enrolled and constitutes a lien on the property of defendant. . . . *Complainant avers upon information and belief that defendant has concealed his assets and resorted to other devices for the purpose of hindering, delaying and defrauding complainant of its rights as a judgment creditor, and complainant has no plain, adequate, speedy and complete remedy at law.*" (Emphahis ours).

Petitioner declined to make a discovery or to answer the charge of fraudulent concealment, stating in his plea under oath that an answer might tend to incriminate him under two State larceny statutes making the concealment

or transfer of assets subject to a judgment lien a criminal offense punishable by fine and imprisonment.[5] Expressly here invoked was the privilege vouchsafed to Petitioner under the Fifth and Fourteenth Amendments to the *Constitution of the United States* (R. 525).

After a special hearing on the plea, the constitutional claim was rejected and Petitioner was ordered to answer (R. 620). A motion to reconsider was overruled (R. 624-627). A supplemental answer was filed under oath, reiterating the constitutional privilege against self-incrimination and again declining to answer the objectionable allegations (R. 628-629).

On reconsideration, the Chancellor conceded application of the constitutional privilege against self-incrimination to the charge of concealment of assets and released Petitioner from the previous order directing that an answer be made to the direct charge of concealment, stating "To hold otherwise would, in my opinion, possibly deny the right of immunity from self-incrimination in view of Section 2252, Code of 1942, Recompiled" (R. 646), and that "being forced to answer that portion . . . runs head-on into Section 2252 of the Code which does make such action a crime." (R. 678).

Nevertheless, in the same opinion the Chancellor held that the constitutional privilege against incriminatory discovery as to the *details* of the alleged concealment had been "waived" because of printed language in a bond application stating that the applicant would furnish "financial statements" in the future on request.[6]

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5. *Mississippi Code of 1942*, §§ 2250 and 2252, reproduced as Addendum H.

6. Thus, while Petitioner was excused from answering the *generality* of the criminal charge of concealment, he was ordered to fill in the *details* which composed the generality, despite the claim of privilege.

The document relied upon by the Court for its "waiver" decision is a printed form of bond application on a project known as the Shively, Kentucky Sewer Project. Petitioner did not sign the document but gave a letter which adopted it by reference. It is only one out of twelve bond applications referred to in the money judgment ultimately secured against Petitioner. It is on a printed form supplied by Respondent's co-surety on the "Shively" project, and is the only application out of the twelve involved in the money judgment which contains any such proviso relating to furnishing financial statements (Addendum I).

A trial was held on the merits and the Chancellor ruled (1) that a course of conduct was shown indicating concealment of assets when regard was had for Petitioner's failure to testify, (2) that a full discovery of the identity, status and location of assets of every kind would be required, and (3) that specific performance of the agreement to furnish a financial statement would be required, "and whether this be done by a statement by way of discovery or by a financial statement, I think it matters very little." (R. 1140).

The decree of the Chancellor went somewhat beyond that Court's opinion. The decree appointed Respondent's agent as general receiver with broad visitatorial and inquisitorial powers to be exercised in the name of the Court for the purpose of finding assets and collecting the judgment. It directed "specific performance" by requiring the filing of a specified form of financial statement under oath, plus an elaborate discovery of assets under oath. The decree also included a mandatory injunction which commanded and directed Petitioner to assign and convey all of his properties and assets in his possession or subject to his control to the appointed receiver (R. 1145-1173, Addendum J).

Thereupon, Petitioner filed his "Exceptions to Final Decree" (R. 1181-1184, Addendum E, supra), and these were overruled (R. 1186, Addendum K). The exceptions thus filed reasserted the constitutional privilege against self-incrimination, especially as to the discovery requirements found in Paragraphs 6 and 7 of the final decree (R. 1183).[7]

In apparent full compliance with the mandatory injunction incorporated in the final decree and directing the conveyance of *all* of his assets to the receiver, Petitioner executed a "Quit-claim to Receiver" which included substantial and numerous properties.

On appeal to the Supreme Court of Mississippi, Petitioner filed assignments of error specifically again invoking the rights, privileges and immunities under the Fifth and Fourteenth Amendments to the *Constitution of the United States* (Addendum F, supra). However, the Supreme Court affirmed the decree of the Chancery Court in its entirety (Addendum B, supra), and entered its order accordingly (Addendum C, supra). In due time Petitioner filed a petition for rehearing, and by assignments of error contained in this petition, reasserted the constitutional claims (Addendum G, supra), but the petition was denied (Addendum D, supra).

Thus, it is apparent that the constitutional privilege of remaining silent under the Fifth and Fourteenth Amendments to the *Constitution of the United States* has been claimed by Petitioner at every critical stage of this case, both in trial court and in the appellate court below.

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7. Another exception was to the grant to Respondent's agent of broad visitatorial and inquisitorial powers, assigning violation of the due provisions of the Federal Constitution.

SUMMARY OF ARGUMENT

Petitioner is charged in the Complaint with the fraudulent transfer and concealment of assets subject to a lien. The two criminal statutes with which Petitioner is threatened are *Mississippi Code of 1942*, §§ 2250 and 2252 (Addendum H, supra), whereunder concealment or removal of assets subject to a lien constitutes the crime of larceny.

Yet, despite Petitioner's plea of the Fifth Amendment, the existing decree provides:

> "7. That the defendant, E. E. Morgan, be and he is hereby ordered, directed and commanded to file with the complainant and with the Clerk of this Court, within fifteen (15) days from the date of this decree, a statement in writing setting forth the identity, status and location of all his assets and property of every kind, nature and description. . . ."

Additionally, the decree contained a mandatory injunction directing Petitioner to transfer to a receiver *"all* of the real, personal, or mixed property of said defendant, of every nature and kind, which is in his possession or subject to his control," and in which "defendant has any interest," and this was the order pursuant to which a transfer was made. Thus, the question also arises as to whether the mandatory injunction has been complied with or criminally, wilfully violated. Nevertheless, the presently outstanding order would require Petitioner to make a testimonial discovery under oath which could involve Petitioner in a prosecution for criminal contempt for violating the mandatory injunction.

Denial of the claim of the Fifth Amendment privilege is all accomplished by the Court by first expressing "doubt" that the privilege against self-incrimination was intended to apply to "evading the effects of a lawful judg-

ment," and then by finding a "waiver" in virtue of a purely private promise generally to furnish "financial statements" on request of certain bonding companies, including Respondent.

The money judgment was rendered on July 23, 1965. Respondent's belated demand for a financial statement from Morgan came after the judgment and by letter to Morgan dated September 3, 1965 (R. 27), or five years and seven months after the date of the application on January 25, 1960. The present "creditor's bill" action was filed on April 18, 1968, or over eight years after the date of the Shively bond application.

Thus, the Court has erroneously felt it necessary to construct an unintended "waiver" by reason of a private contract document given in 1960 in the context of circumstances which developed eight years later when Appellant was specifically and directly charged with having committed the crime of larceny by the concealment of assets and at a time after the Court had newly created yet another "law," by its mandatory injunction, which could also result in incrimination of petitioner.

Legal precedent readily discloses that this Court has consistently endeavored to protect and strengthen the privilege against coerced self-incrimination, and has refused at every turn to permit the privilege to be denied, burdened or watered-down.

While the Fifth Amendment's bar to self-incrimination is known to be unpopular, never before has any court burdened the privilege by viewing the plea as a challenge to the Court's power to enforce its judgments. It is submitted that the constitutional plea poses no danger to any court's powers or prerogatives. This fundamental constitutional right cannot properly be cast in doubt as a challenge to a

court's power. Allowing the constitutional privilege closes only one possible avenue of assistance which might otherwise be available to the judgment creditor. All other enforcement aids are in no wise affected.

Safeguarding the privilege against self-incrimination goes to the very heart of keeping the American system of criminal justice accusatorial rather than inquisitorial. For this reason courts throughout the land heretofore have consistently respected the constitutional plea in civil actions seeking discovery of assets, both before and after judgment, where concealment is made criminal in the particular jurisdiction. Furthermore, if the Mississippi Legislature had found any overriding public policy interest in the exaction of testimonial discovery, it easily could and doubtless would have provided immunity from prosecution under the two larceny statutes. No such immunity has been granted and none exists.

Waiver of constitutional rights is not to be lightly inferred. Every presumption is to be indulged against it. It must find its premise on knowing, informed and intentional action. Prospective waivers may only be found where the circumstances making the claim of the privilege appropriate were clearly foreseeable. None of the basic legal requirements and prerequisites of waiver are present here. There was no voluntary relinquishment of a known right. At most there was the adoption of an obscure passage in a printed application form for a contract bond between private parties that petitioner would, on request, furnish financial statements. This occurred long before Petitioner was accused of violating two felony statutes and eight years before a new "law," in the form of a mandatory injunction, was passed which could incriminate Petitioner.

No reported decision has ever found such a "waiver" under the circumstances present here.

Finally, the Court has made one of the parties litigant its officer and official representative and authorized him to act as an adversary in the pursuit of petitioner. This court-sanctioned agent is without bounds in or restrictions on his searches and seizures. Even a judgment debtor's meager rights to due process of law are violated by such a device.

ARGUMENT

I.

Application of the Fifth Amendment in General

The doubts expressed by the Court as to the intended application of the Fifth Amendment to embarrass the collection of civil money judgments makes relevant a brief review of the case law which has developed over the past several years in the Federal area.

In 1951 the Supreme Court decided *Hoffman* v. *United States* (1951), 341 U.S. 479, 71 S.Ct. 814, and there laid down broad liberalized guidelines for application of the Fifth Amendment privilege against self-incrimination.

In 1964 it was decided in *Malloy* v. *Hogan* (1964), 378 U.S. 1, 84 S.Ct. 1489, that State Courts were bound by the Fifth by force of the Fourteenth Amendment and by the standards enunciated by the Federal Courts for its application.

Hoffman requires that the Fifth Amendment be liberally applied in all cases where enforced answers to interrogatories can even possibly have a tendency to incriminate, or which could furnish a "link in a chain of evidence needed to prosecute." In a long line of Federal cases, the privilege has been applied to all manner of situations and in every type of proceeding, both civil and criminal.

In *United States* v. *Courtney* (CA 2, 1956), 236 F.2d 921, it is held that where the right to claim the privilege exists, the motive for making the claim is immaterial.[8] In *Ullmann* v. *United States* (1956), 350 U.S. 422, 76 S.Ct. 497, the Court held that "This constitutional protection must not be interpreted in a hostile or niggardly spirit." (76 S.Ct. at 500). In *Malloy* v. *Hogan*, supra, this Court has ordered that no State should use a " 'watered-down, subjective version of the individual guarantees of the Bill of Rights.' "

II.

The Court's Expressed Doubt As to the Application of the Privilege Is Unfounded

The Court below has stressed and premised its "waiver" decision on the expressed view that judgments are not to become mere " 'scraps of paper' "; and finally that "in a civil proceeding we express doubt that it was ever intended that the privilege could be transformed into an affirmative device whereby a judgment debtor can effectively thwart the processes of the court."

Truly, our courts must not be relegated to a state of impotency, but such could not be the result here and the subordination of collection powers to the Fifth Amendment right has never caused any court before to doubt application of the privilege in civil cases.

The constitutionally based privilege against self-incrimination in civil proceedings involving attempted discovery of assets where concealment is criminal has long been recognized by this Court.[9]

8. See also *Burdick* v. *United States* (1914), 236 U.S. 79, 35 S.Ct. 267. Also 8 *Wigmore on Evidence*, 3rd ed., Sec. 2260.

9. *United States* v. *The Saline Bank of Virginia* (1828), 1 Pet. 100, 7 L.Ed. 69; and *Arndstein* v. *McCarthy* (1920), 254 U.S. 71, 41 S.Ct. 26.

McCarthy v. *Arndstein* (1923), 45 S.Ct. 16, 266 U.S. 34, involved a bankruptcy proceeding.[10] The Court upheld the bankrupt's claim of privilege against forced testimonal discovery of assets where concealment was a criminal offense, saying:

> ". . . The contention now is that the privilege against self-incrimination ought to have been disallowed because, under the Constitution, it does not extend to the examination of a bankrupt in a bankruptcy proceeding.
>
> "The government insists, broadly, that the constitutional privilege against self-incrimination does not apply in any civil proceeding. The contrary must be accepted as settled. The privilege is not ordinarily dependent upon the nature of the proceeding in which the testimony is sought or is to be used. It applies alike to civil and criminal proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it. The privilege protects a mere witness as fully as it does one who is also a party defendant. It protects, likewise, the owner of goods which may be forfeited in a penal proceeding. See Counselman v. Hitchcock, 142 U.S. 547, 563, 564, 12 S.Ct. 195, 35 L.Ed. 1110.
>
> "The government urges more strongly a narrower contention. It claims that the constitutional privilege does not relieve a bankrupt from the duty to give in-

10. This case first appeared as *Arndstein* v. *McCarthy* (1920), 254 U.S. 71, 41 S.Ct. 26, wherein the Court first upheld the privilege as applicable to a debtor in involuntary bankruptcy and held that the filing of schedules "did not constitute a waiver of the right to stop short whenever the bankrupt could fairly claim that to answer might tend to incriminate him." Later, the trustee sought intervention and reargument (254 U.S. 379, 41 S.Ct. 136), but the Court concluded that "Our conclusion concerning the constitutional question presented, we think, is so plainly correct that a reargument would be unprofitable." Cf. *McCarthy* v. *Arndstein* (1923), 262 U.S. 355, 43 S.Ct. 562, wherein the bankrupt was said to be "practically in the position of a witness where he is under cross-examination." This case has been cited in such later landmark cases as *Hoffman* v. *United States* (1951), 341 U.S. 479, 71 S.Ct. 814 and *Malloy* v. *Hogan* (1964), 378 U.S. 1, 84 S.Ct. 1489.

formation which is sought for the purpose of discovering his estate. It asserts that in England such an exception to the common law privilege prevails, and that the exceptions had been established there prior to the Declaration of Independence. Whatever may be the rule in England, it is clear that in America the constitutional prohibition of compulsory self-incrimination has not been so limited.

"The cases which hold that a bankrupt must surrender books and papers, although they contain incriminating evidence, rest upon a principle different from that here involved. . . ." (45 S.Ct. at 17).

ALSO

". . . When the bankrupt appears before a commissioner under this section, he comes, like any other person, merely to testify. In that connection he may, like any other witness, assert the constitutional privilege; because the present statute fails to afford complete immunity from prosecution. . . ." (45 S.Ct. at 17).

The State Court decisions are the same, even where statutes expressly provide for the discovery of assets. For example, many of the states have post judgment discovery statutes. Consistently, these statutes have either been declared unconstitutional for failure to allow for the privilege or grant immunity from criminal prosecution or have been held to imply the necessary constitutional exception.

30 *Am. Jur. 2d*, Executions, § 826, states:

"A statute providing for the examination of the judgment debtor to determine whether he has any property subject to execution is unconstitutional if such examination is made compulsory and no provision is made for such immunity from prosecution as is requisite when self-incriminatory testimony is required. . . ."[11]

11. *Horstman* v. *Kaufman* (1881), 97 Pa. 147, 39 Am. Rep. 802, cited to the above text involved the attempted statutory examination of the judgment debtor on oath as to his property. The

By application of the same principles, the same result is reached in reference to pre-trial interrogations. See *Levine* v. *Bornstein* (1958), 174 N.Y.S.2d 574, and cases cited, including *Owen* v. *Fisher* (N.Y. 1947), 66 N.Y.S.2d 856, holding that the privilege is available to a party in a civil proceeding when claimed on a pre-trial discovery deposition.[12]

Time and time again, the same principle has been applied in the Federal Courts in reference to civil discovery proceedings.[13] *There are no exceptions.*

In the wake of this array of authority which admits of no exception whatever, it is submitted that there is no serious threat to the powers of the judicial branch of the government.

Court held that the statute was unconstitutional under the self-incrimination clause of the State Constitution, since fraudulent concealment was a statutory misdemeanor.

Mitchell v. *Godsey* (Ind., 1944), 222 Ind. 527, 53 N.E.2d 150, also cited to the text, involved a statutory post judgment creditor's action seeking discovery of assets. The Court upheld the act, but only because, despite its mandatory language, the defendant could not be "compelled to answer any question which would tend to incriminate him."

The Court cited its prior decision in *Overman* v. *State* (1924), 194 Ind. 483, 143 N.E. 604, which held that incriminating testimony could not be required "even though a statute purports to require the giving of such testimony."

Also, see: *Ex parte Clarke* (1894), 103 Cal. 352, 37 P. 230, holding that an insolvent debtor could not be compelled to make disclosures where concealment was criminal, absent a statute granting complete immunity from criminal prosecution; and *North* v. *Kirtley* (Mo., S.C. 1959), 327 S.W.2d 116, upholding the privilege in a proceeding under a post judgment discovery statute providing for the examination of judgment debtors.

12. See also to the same effect: *Akers* v. *Fuller* (1950), 312 Ky. 502, 228 S.W.2d 29; *Kindt* v. *Murphy* (1950), 312 Ky. 395, 227 S.W.2d 895; *Muniford* v. *Croft* (Del., 1952), 93 A.2d 506; *American Cyanamid Co.* v. *Sharff* (CA 3, 1962), 309 F.2d 790. The Kentucky Court cited appropriately *Boyd* v. *United States* (1886), 116 U.S. 616, 6 S.Ct. 524.

13. In addition to *McCarthy* v. *Arndstein*, supra, and *Boyd* v. *United States*, supra, see *United States* v. *Saline Bank of Virginia* (1828), 1 Pet. 100, 7 L.Ed. 69; *Murphy* v. *Waterfront Commission of New Harbor* (1964), 378 U.S. 52, 84 S.Ct. 1594; *Application of Gault* (1967), 387 U.S. 1, 87 S.Ct. 1428.

III.

There Was No Waiver

Never before has any Court, as here, found a waiver of a properly claimed Fifth Amendment privilege against testimonial self-incrimination in virtue of a purely private contract document given prior to the advent of the occasion for invoking the privilege.

Although waiver of a federal constitutional right is governed by federal standards,[14] the Court below did not cite or discuss the federal cases dealing with the presumption against waiver.[15]

The document relied upon by the Court for its "waiver" decision, given several years before any occasion arose for claiming the privilege, does not state that anyone "waives" the right to remain silent in such circumstances. In printed form, it simply contains a general clause providing that the applicant for the construction bond will furnish "financial statements" on reasonable request. The unilateral provision plays hide-and-seek in the fine print of a long stereotyped form document known as a bond application. An exact Zerox copy is attached (Addendum I, supra).

The Court has turned this routine printed clause providing for furnishing future "financial statements" into an obligation to provide a sweeping testimonial discovery under oath in a judicial post-judgment collection proceeding in which Petitioner is formally and directly accused of the

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14. "The question of an effective waiver of a federal constitutional right in a proceeding is of course governed by federal standards." *Boykin* v. *Alabama* (June, 1969), 89 S.Ct. 1709.

15. The federal presumption is against waiver. *Brookhart* v. *Janis* (1966), 384 U.S. 1, 86 S.Ct. 1245, 16 L.Ed.2d 314; *Johnson* v. *Zerbst* (1938), 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461.

crime of larceny and exposed to criminal contempt in relation to the alleged concealment of the very assets sought to be discovered.[16]

There is yet another fatal deficiency in the prospective application of the generality of this document in terms of a waiver in this case. Even if one may waive by contract for the future the constitutional privilege against self-incrimination upon the existing criminal statutes, *the Court has additionally imposed a prospective waiver under a criminal law later enacted.*

Reference is to the law made by the mandatory transfer injunction. Petitioner is thereby enjoined and directed to transfer *all* of his assets to the receiver (R. 1151). Under the command of this injunction Petitioner did, in fact, execute, within the allowed time, a conveyance of numerous properties (R. 1299-1300). Did this conveyance serve to transfer "all" assets? If so, further discovery would avail nothing. The only real purpose of further pursuing discovery would be hopefully to force Petitioner to say that "all" assets were not transferred and that others remain concealed. But if this be so, then Petitioner would be forced to furnish, out of his own mouth, evidence on which to base his prosecution for criminal contempt. *Mississippi Code of 1942*, § 1278.[17]

Criminal contempt is no different from any other crime. It entails all of the constitutional rights relating to criminal prosecutions, including the Fifth Amendment

16. See the *Arndstein* v. *McCarthy* opinions reported in 254 U.S. at 71 and 379 (cited in Footnote No. 10, supra).

17. *Code*, § 1278: "The chancery court, or the chancellor in vacation, or judge granting the writ, shall have power to punish any person for breach of injunction, or any other order, decree, or process of the court, by fine or imprisonment, or both, . . ."

right to remain silent. It is so held in *Bloom* v. *State of Illinois* (1968), 391 U.S. 194, 88 S.Ct. 1477.[18]

The mandate to transfer sets just as much of a standard for measuring criminal conduct as any other criminal law and its violation is just as much a crime and is just as punishable. This court-made law did not exist until several years after execution of the Shively document. Respondent requested the injunction, obtained it, availed itself of its fruits. Yet the Court would now, by its decree, force Morgan to give a testimonial discovery designed admittedly to furnish out of his own mouth evidence of its criminal violation. It is submitted that enforced testimonial disclosure is impermissible in these circumstances.

Cited Cases Distinguished

In support of its waiver decision, the Court cites a number of authorities pointing up certain differences between the application of the Fifth Amendment in civil and criminal cases, but these are of only academic interest. This is so because (1) there can be absolutely no doubt that the effect of the discovery interrogation is to force Morgan to give evidence out of his own mouth which could directly incriminate; and (2) given the chance of incrimination, the privilege, under *all* the authorities, is fully and equally applicable in civil cases.

Authorities cited to the "waiver" conclusion include and are limited to: *Shepard* v. *Barron* (1904), 194 U.S. 553, 24 S.Ct. 737, 48 L.Ed. 1115; 8 *Wigmore on Evidence* (McNaughton Rev. 1961); and *Zap* v. *United States* (1946),

18. See also: *Gompers* v. *Buck's Stove and Range Co.* (1910), 221 U.S. 418, 31 S.Ct. 492, quoted in *Bloom*. Cf. *Marchetti* v. *United States* (1968), 390 U.S. 39, 88 S.Ct. 697, on the point that an opportunity to refrain from violation of the law in the first instance does not serve as a waiver of the right to claim the privilege.

328 U.S. 624, 66 S.Ct. 1277, 90 L.Ed. 1477. None of these support the "waiver" decision.

Shepard v. *Barron*, supra, cited by the Court, is a recognized authority for the generality that constitutional privileges may be waived. This has never been questioned. But this case did not involve the privilege against self-incrimination. It involved the validity of a tax assessment for street improvements on the assertion that a statute of Ohio authorizing county commissioners to construct streets and assess abutting property owners on a "front foot" basis was arbitrary and therefore a taking of property without "due process" of law.

But this case turned upon an estoppel resulting from affirmative acts of the petitioner, both before and after the assessment, whereby, knowing the provisions of the law, he petitioned and induced the authorities to construct the street under the front foot assessment statute.

This case is so foreign to the facts in the case at bar that it must take its place simply to the general point that constitutional privileges can, under extreme circumstances, be lost by estoppel.

The Court then quotes from 8 *Wigmore on Evidence*, § 2275 (McNaughton Rev. 1961). But instead of supporting a prospective waiver by private contract in relation to enforced testimonial disclosures, the text states clearly that:

> "A bare contract to waive the privilege will not be enforced *specifically*. . . ."

The Court evidently concluded that the promise here involved was not a "bare" contract. To reach that result, resort was had to the concept that Morgan, by indemnifying the bonding company, became some kind of a fiduciary and that the public interest in the effectiveness of our

entire Court system was somehow sufficient to override the privilege. Then, having moved on from the "bare" contract concept, reliance was placed upon the next paragraph of the *Wigmore* text, which is quoted (with emphasis by the Court) as follows:

> "Where there are not only the ingredients of an express or implied contract to waive privilege but also a *fiduciary relation* or other elements of public policy making recognition of privilege unconscionable, the waiver of privilege may be specifically enforced and the witness held in contempt for failure to make disclosures. . . ."

But the quoted *Wigmore* exception to the "bare contract" rule cites only one case involving a constitutional plea of the Fifth Amendment privilege. This is *United States* v. *Field* (CA 2, 1951), 193 F.2d 92, which we shall presently discuss.[19]

Following this, *Wigmore* in footnote No. 5, states:

> "About the *Field* case, supra, Mr. Boudin had this to say: 'This conclusion—that the privilege may be waived by advance contract—was not advanced by the government and is not supported by any decisions in this country. . . . The court . . . adopted a new rule, waiver by contract, which appeared to be contrary to settled American law.' Boudin, The Constitutional Privilege in Operation, 12 Law. Guild Rev. 128, 139-40 (1952)." (8 *Wigmore on Evidence* at 455).

The fact is that the majority in the *Field* case relied upon its concept of a bail bond contract as creating a fiduciary relationship in the *public trust*, thus setting it apart

19. The two other cases cited did not involve a claim of the Fifth Amendment privilege. One was an opinion by a Delaware Chancellor in 1851, *State* v. *Maury*, 2 Del. Ch. 141, involving a bill to enjoin a lottery, wherein the public interest was noted along with the *rule in chancery* against requiring disclosures that could incriminate or cause forfeitures. The other is an 1827 English Court decision, *Green* v. *Weaver*, 1 Sim. 404, 57 Eng. Rep. 630.

from ordinary situations falling outside of the public trust and merely relating to the general burden of citizenship. The *Field* Court first held that inquiry as to the location of books and records was permissible and then that the right to thus inquire included "implementing questions concerning their contents." Analogy was drawn to the obligations of disclosure by public officers such as policemen and to some State Court decisions allowing interrogation of these officers relative to the performance or non-performance of public functions, concluding finally that while answers in the particular case were "only remotely and at best unclearly dangerous", such could, on the other hand, greatly serve the public interest.

In the case at bar there is no fiduciary in the *public trust* and no such considerations of public policy as were thought controlling by the *Field* majority, and there is nothing in the case at bar from which it may be said that the danger of incrimination was only remote or unclear.

Even so, the majority opinion in the *Field* case has been rejected by the Supreme Court of the United States and twice contradicted by the same Second Circuit Court of Appeals in which two of the same judges participated.

In *Curcio* v. *United States* (1957), 354 U.S. 118, 77 S.Ct. 1145, the Supreme Court held, contrary to the *Field* case, that the secretary-treasurer of a labor union could invoke the privilege in refusing to answer questions as to the whereabouts of missing books and records which he had been subpoenaed to produce but had not produced, even though there was no privilege as to the books themselves. In making this ruling, the Court reversed the Second Circuit decision affirming a contempt conviction and also rejected that Court's earlier decision in *United States* v. *Field*, saying:

"The Government cites but one federal case, United States v. Field, 2 Cir., 193 F.2d 92, as directly supporting its position. In that case, the trustees of a bail fund were held in contempt for failure to produce records of the fund pursuant to a subpoena. After affirming the convictions on that ground, the Court of Appeals for the Second Circuit went on to consider, *by way of dictum,* other contentions raised by the trustees. One of their contentions was that questions about the location and production of records were improper. The court, relying on several cases in which a custodian was compelled to identify records which he had already produced, said that the questions pertaining to the location of the records 'were proper under the precedents.' Id., at page 97. The cases cited, however, *do not support the court's dictum.*" (Emphasis ours) (77 S.Ct. at 1150-1151).

In footnote No. 6 (77 S.Ct. at 1151), the Court said:

"Moreover, prior and subsequent decisions of the same court, in which two of the same judges participated, contradict the statement contained in the Field case. . . ."

The dissenting views of Judge Frank in *Field* are in accord with currently prevailing law of the land. As if in response to the opinion in the case at bar, Judge Frank observed:

". . . Their obligation to disclose is wholly contractual, deriving by implication from their contract as sureties. No American case has been cited, and I can find none, to the effect that, by any advance contractual promise; the privilege can be abrogated. All the pertinent decisions hold the other way. . . ." (193 F.2d at 105)

ALSO

"Very much in point are the cases relative to policemen and other public officers, for they involve contractual obligations owed to a government. . . . Yet the courts, whenever the issue has arisen, have said,

with no exception, that such an officer, if called in an inquiry concerned with facts squarely within the scope of the officer's sworn official duty, may efficaciously assert the privilege. (Citing several State Court cases)." (193 F.2d at 105).

Recently, this very rule was adopted by the Supreme Court of the United States in *Garrity* v. *State of New Jersey* (1967), 385 U.S. 493, 87 S.Ct. 616, wherein it was held that police officers, accepting employment subject to a statute which required them to give evidence, might nevertheless invoke the privilege.[20]

In the very recent case of *Gardner* v. *Broderick* (1968), 392 U.S. 273, 88 S.Ct. 1913, it was held that a city policeman could not be dismissed for refusing to waive the privilege against self-incrimination, and that the city charter under which the policeman was hired could not prevail, although it expressly provided for such dismissal on refusal to waive the privilege.

In *Spevack* v. *Klein* (1967), 385 U.S. 511, 87 S.Ct. 625, this Court further expanded its non-waiver policy by holding that the obligation assumed by a lawyer could not abridge his privilege to remain silent in a state inquiry into his professional conduct.

The latest case specifically on the subject of waiver of constitutional rights is *Barber* v. *Page* (1968), 390 U.S. 719, 88 S.Ct. 1318. While this case did not involve specifically the self-incrimination provision, the Court adopted the view that when, at the time of an alleged waiver of a constitutional right, the party is unaware of circumstances which may make assertion of the constitutional right appropriate, there is no prospective waiver.

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20. The Court cited its previous decision in *Slochower* v. *Board of Education* (1956), 350 U.S. 551, 76 S.Ct. 635, 100 L.Ed. 692, holding that a public school teacher could not even be discharged for invoking the Fifth Amendment privilege.

Finally, the Court cites and quotes *Zap* v. *United States* (1946), 328 U.S. 624, 66 S.Ct. 1277, 90 L.Ed. 1477. But in placing reliance here, the Court failed to regard the vital difference between the seizure or production of public or quasi-public records under the "required records doctrine" and an attempted enforced testimonial discovery from the mouth of one claiming the privilege against self-incrimination. The question of the seizure of books or records of any sort is not here involved.

Zap involved a cost-plus contract with the Navy Department for work on airplanes. The contract and also an Act of Congress provided for the keeping of records which "shall at all times be subject to inspection and audit." These records were seized for inspection. No testimonial discovery, either as to the location or contents of the records, was involved. The seizure was upheld on the view that the records were quasi-public records.

While *Zap* did not use the term "required records", the decision was nevertheless based on the doctrine and has been recognized in support of the doctrine, as to which see *Porter* v. *Mueller* (CA 3, 1946), 156 F.2d 278.[21]

Even the "required records" doctrine in the field of the public domain has been carefully limited. Thus, in *Spevack* v. *Klein* (1966), 385 U.S. 511, 87 S.Ct. 625, the Court declined to apply the "required records" doctrine to records required to be kept by an attorney under state law, holding that the records were privileged under the Fifth Amendment and that the attorney could not be disbarred for invoking the privilege.

21. The "required records" doctrine finds support from the view that records required by law or contract to be kept in relation to *public* work lose their identity as personal records and become public or quasi-public records. The doctrine dates back to *Wilson* v. *United States* (1911), 221 U.S. 361, 31 S.Ct. 538, 55 L.Ed. 771. The current version finds expression in *Shapiro* v. *United States* (1948), 335 U.S. 1, 68 S.Ct. 1375.

The distinction implicit in the "required records" seizure and testimonial discovery even as to the location of such records is clearly explained in *Curcio* v. *United States* (1957), 354 U.S. 118, 77 S.Ct. 1145, wherein the Supreme Court held, contrary to the holding in the *Field* case, that a labor union officer could claim the privilege against a testimonial disclosure of the location of missing union records, even though there was as to the books themselves no privilege.

The last case cited by the Court is the State Court case of *Crest Catering Co.* v. *Superior Court* (1965), 42 Cal. 110, 398 P.2d 150. But this case does not involve any constitutional privilege at all, but only the privilege surrounding corporate employment tax returns.

Therefore, with deference, the Court's constitutional decision finds no support in any cited authority. And as Judge Frank stated:

> ". . . No American case has been cited, and I can find none, to the effect that, by any advance contractual promise, the privilege can be abrogated. All the pertinent decisions hold the other way. . . ." (193 F.2d at 105).

Ordinary fiduciaries, even if Petitioner could properly be so classified, stand in no different position and now even fiduciaries in the public trust, such as policemen, school teachers and lawyers, are recognized as having equal rights to remain silent when to speak could incriminate.

With deference, the Court below has misread the cases, especially *Zap*, and has reversed the Federal presumption against waiver of fundamental constitutional rights.

In *Chapman* v. *State of California* (1967), 386 U.S. 18, 87 S.Ct. 824, it was held that rights relating to the

constitutional privilege in a State proceeding is a Federal question. In *Brookhart* v. *Janis* (1966), 384 U.S. 1, 86 S.Ct 1245, 16 L.Ed.2d 314, the Court said:

> "The question of a waiver of a federally guaranteed constitutional right is, of course, a federal question controlled by federal law. There is a presumption against the waiver of constitutional rights, see, e.g., Glasser v. United States, 315 U.S. 60, 70-71, 62 S.Ct. 457, 464-465, 86 L.Ed. 680, and for a waiver to be effective it must be clearly established that there was 'an intentional relinquishment or abandonment of a known right or privilege.' Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461." (86 S.Ct. at 1247).

In *Johnson* v. *Zerbst* (1938), 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461, the Court said:

> ". . . It has been pointed out that 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and that we 'do not presume acquiescence in the loss of fundamental rights,' . . ." (58 S.Ct. at 1023)

IV.

Appointment of the Receiver Was Erroneous

The Court below appointed as a general receiver an agent of the judgment creditor. The Chancellor expressly observed that he should act as an adversary.

Thus has the Court cast itself, through its appointed agent, officially in the role of an adversary, and has given its agent a blanket warrant to search and seize and threaten third parties in the Court's name for failing to comply with the receiver's demands.

The powers invested by the order in the litigant-receiver are limited only by the outer bounds of the Receiver's imagination and his counsel's ingenuity.

Since the Receiver is the litigant (judgment creditor) and his Court appointed counsel is the litigant's own attorney, the bounds exceed those circumscribed by due process of law.

CONCLUSION

It is respectfully submitted that the Writ of Certiorari should issue and that the decision of the Supreme Court of Mississippi should be reversed to the extent of the denial by the decision of that Court of Petitioner's constitutional claims under the Fifth and Fourteenth Amendments to the *Constitution of the United States.*

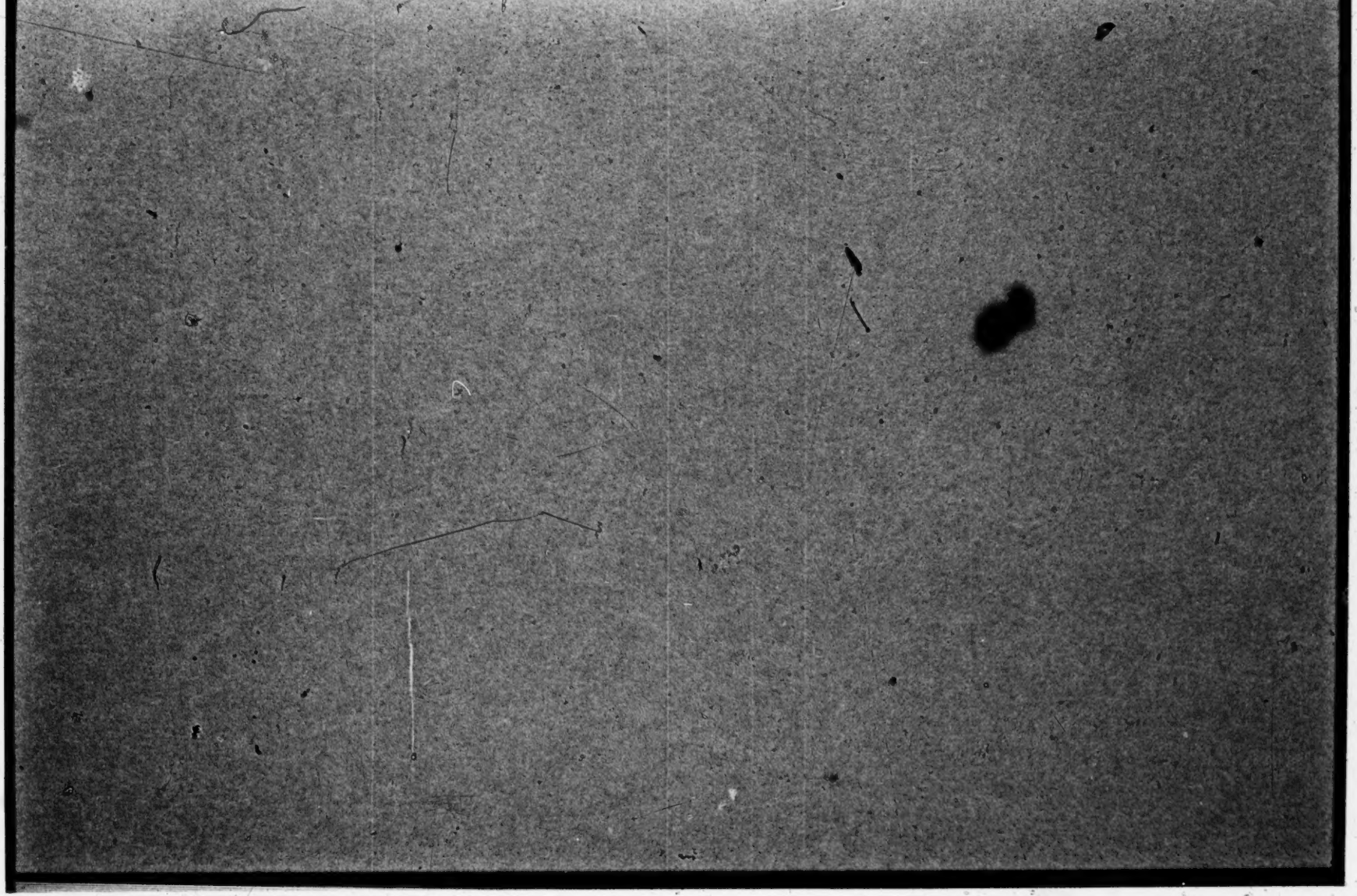
Respectfully submitted,

CHARLES CLARK
1741 Deposit Guaranty Bank Building
Jackson, Mississippi
VARDAMAN S. DUNN
1741 Deposit Guaranty Bank Building
Jackson, Mississippi

Of Counsel:

COX, DUNN & CLARK
1741 Deposit Guaranty Bank Building
Jackson, Mississippi

ADDENDUM



ADDENDUM A

IN THE CHANCERY COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

No. 71,194

UNITED STATES FIDELITY AND GUARANTY COMPANY
Complainant

vs.

E. E. MORGAN
Defendant

OPINION OF THE COURT

ON MOTION FOR DETERMINATION OF DEFENDANT'S CLAIM OF PRIVILEGE TO REFUSE TO ANSWER FULLY.

On July 23, 1965, in Cause No. 66,254 on the docket of this Court, styled "United States Fidelity and Guaranty Company v. R. W. Hyde, Jr., et al.", a final decree was rendered awarding United States Fidelity and Guaranty Company a judgment against E. E. Morgan and others in the amount of $2,968,962.11. The said decree was affirmed by the Supreme Court of Mississippi. See 191 So. 2d 917 (1966).

United States Fidelity and Guaranty Company (hereinafter referred to as USF&G) filed in the above entitled and numbered cause its creditor's bill against E. E. Morgan. Paragraph 8 of said bill is as follows:

"Complainant further avers that the money judgment in favor of complainant against defendant is and remains in full force and effect and has been affirmed by the Mississippi Supreme Court and there is now actually due to complainant thereon the principal amount of $2,968,962.11, together with lawful interest thereon from the date of the rendition thereof, together with the 5% damages provided by Section 1971, Mississippi Code of 1942, plus attorneys' fees of $25,000 allowed by the Supreme Court. *Said judgment has been duly enrolled and constitutes a lien on the property of defendant.* Complainant is informed and believes, and upon such information and belief avers that defendant has a considerable amount of money and of legal and equitable debts, claims and demands due him from different persond (sic), the names of whom are unknown to complainant, and that said defendant has a large amount of oil, gas and mineral interests and other interests in real estate, stocks of different kinds, securities, promissory notes and other evidences of debt, and other personal property, either in his possession or held in trust for him by others, the situation, value and particulars of which are unknown to complainant, and which ought in justice and equity be applied to the satisfaction of the aforesaid money judgment. Complainant avers upon information and belief that *defendant has concealed his assets and resorted to other devices for the purpose of hindering, delaying and defrauding complainant of its rights as a judgment creditor,* and complainant has no plain, adequate, speedy and complete remedy at law." (Emphasis added).

By leave of this Court USF&G amended the foregoing paragraph 8 by adding the following language thereto:

"Complainant has made diligent efforts to collect said money judgment by the use of available processes at law but has not been able so to do. Complainant has sued out numerous writs of garnishment against persons believed to be indebted to defendant or to

have assets of defendant in their possession, but said garnishment proceedings have not resulted in the collection of any substantial portion of the amount due from defendant on said judgment. Complainant has caused execution to be duly issued to the Sheriff of Hinds County, Mississippi, and such execution has been returned by said Sheriff *"nulla bona"*. Complainant avers that it has not been able to locate any property of defendant subject to execution which would satisfy said judgment, and it would be futile to issue further executions or writs at law. Complainant avers that it has no plain, adequate, speedy and complete remedy at law to enforce and collect said judgment, and complainant is entitled to invoke the aid of this Court of equity to enforce and collect said judgment."

Defendant's answer to said paragraph 8 of the amended bill of complaint admits the money judgment is in full force and effect, and that same is duly enrolled and constitutes a lien on defendant's property. He admits that complainant has sued out a number of writs of garnishment, and he admits return of execution *nulla bona*. He denies all remaining allegations of said paragraph except that portion relating to the averments concerning his assets, which complainant states that defendant ". . . has concealed . . . and resorted to other devices for the purpose of hindering, delaying and defrauding complainant of his rights as a judgment creditor . . .".

As to said portion regarding his assets, defendant declines to answer on the ground of the privilege of immunity from self-incrimination. Specifically, defendant states the following:

". . . and responding to the demand for answer to said excepted portion of Paragraph 8 of the Bill of Complaint, (defendant) says that he declines to answer, as he is advised he has a right to do, on the ground that an answer to said allegations may tend to

incriminate him, hereby now invoking the privilege vouchsafed to him under the Fifth and Fourteenth Amendments of the Constitution of the United States of America and under Article 3, Section 26 of the Mississippi Constitution of 1890."

The question before me is, of course, whether defendant can invoke the privilege of immunity against self-incrimination under the particular facts peculiar to the case *sub judice.*

Creditor's bills may be maintained in this State in the chancery courts as a means of discovery of assets where judgment has been obtained and execution returned *nulla bona,* or, under Section 1327, Miss. Code of 1942, Recompiled, such suit may be maintained whether a judgment has been obtained or not, and whether the debt be due or not, in order to set aside fraudulent conveyances of property or other devices resorted to for the purpose of hindering, delaying or defrauding creditors. Much has been said during the hearing on this matter concerning Section 1327, but it is obvious that USF&G is not invoking the aid of this section, because here there has been a *nulla bona* return of the execution. Section 1327 is available where execution *has not been returned unsatisfied.* The right to maintain a creditor's bill where judgment has been obtained and execution returned *nulla bona* has always existed in our courts of equity, when no adequate remedy at law remains; the statute (Sec. 1327) was enacted as an auxiliary to the ancient creditor's bill in chancery, and broadens the remedy for the purpose of defeating fraudulent conveyances and other devices tending to hinder, delay or defraud creditors.

Section 2252, Code 1942, Recompiled, defines as a crime the removal from the county in which it may be any personal property subject to a lien by judgment, without

consent of the holder of the encumbrance, or the *concealing, secreting, sale* or *disposal* of such property without the consent of the beneficiary and without first discharging the lien. Paragraph 8 of the amended bill of complaint charges that Morgan is vested with certain assets subject to the judgment lien, the particulars of which are unknown to complainant. This assertion, of itself, does not impute a criminal act. However, the issue concerns conduct which is also criminal through USF&G's assertion that ". . . defendant has concealed his assets and resorted to other devices for the purpose of hindering, delaying and defrauding complainant of its rights as a judgment creditor . . .".

It is settled in this State that the constitutional provision against self-incrimination is applicable to an answer in a chancery case. Bailey v. Muse, 227 Miss. 51, 85 So. 2d 918, 924 (1956).

In cases of this sort, where parts of the answer would tend to incriminate the defendant, he must raise the issue and claim the privilege before answer is filed, so that the trial court may have the opportunity to pass upon it. Bailey v. Muse, supra. The defendant did not raise the issue before filing his answer in the case at bar, but complainant placed the matter before the Court by filing a motion for determination of the issue.

The final decree rendered in the aforesaid Cause No. 66,254, out of which the creditor's bill now before me arises, adjudged the following:

> "4. That the bond applications and indemnity agreements signed by R. W. Hyde, Jr., E. E. Morgan, Morgan Investments, Inc., 3100 Corporation, Hyde Construction Company, Inc., H & F Engineering Company, Incorporated, Lacoste, Inc., Talbert & Brown Contractors, Inc., Universal Bridge Company and Slade and McElroy, Inc. are valid and binding obligations upon said

defendants; that complainant is entitled to reimbursement, indemnification and exoneration by said defendants pursuant to the terms and provisions of said bond applications and indemnity agreements; and said defendants are obligated to perform specifically each and every obligation assumed by them under the terms of each of the various bond applications and indemnity agreements signed by them in regard to the jobs and bonds described in the Bill of Complaint, as amended; . . ."

Listed among the bonds, jobs and indemnitors thereon referred to by the above-quoted portion of the said final decree is the following:

"Date	Obligee	Description	Amount of Payment and Performance Bonds
		* * *	
1/25/60	City of Shively Kentucky	For construction of Sewage System for City of Shively, Kentucky; Contracts 1, 2, 3, 4, 5 & 6	$2,721,419.00

The indemnitors on this job being: R. W. Hyde, Jr., E. E. Morgan, Hyde Construction Company, Inc., H & F Engineering Company, Incorporated, Lacoste, Inc., Talbert & Brown Contractors, Inc."

Attached to the creditor's bill in the case at bar as EXHIBIT "B" is a copy of an indemnity agreement executed by R. W. Hyde, Jr. and E. E. Morgan, whereby they agree to indemnify USF&G in the sum of $2,721,419.00, as surety on a performance bond on behalf of R. B. Tyler Company, Inc., of Louisville, Kentucky, and Hyde Construction Company, of Jackson, Mississippi, a joint venture (Hyde Construction Company being the trade name of a partnership composed of R. W. Hyde, Jr. and E. E. Morgan). The bond application relative to this indemnity agreement names the City of Shively, Kentucky, as obligee in connection with a contract for the construction of a sewage

system, and is dated January 25, 1960, and signed by Gaines P. Wilson for R. B. Tyler Company, Inc., and R. W. Hyde, Jr. for Hyde Construction Company. Paragraph "Tenth" of said bond application states as follows:

> "Tenth: A representative of the Sureties shall have access at all reasonable times and places to the books and records of the said applicants and to correspondence with the representatives of said Obligee and shall be entitled to receive full information from the applicants and the banks of deposit of the said applicants and shall be given such information as such representatives shall request, all as the same relate to the construction work to be performed by the applicants in connection with the contract hereinbefore mentioned. In case the applicants shall object to any person appointed by the Sureties as their representative, then another person shall be appointed, and if such successor shall not be satisfactory, the Sureties shall select another person, but it shall not be obligatory upon the Sureties to change the third person so selected unless in their judgment it shall be proper to do so. In addition to the above information to be furnished from, and the right given to the Sureties to examine, the books, records, correspondence and bank accounts of applicants as the same relate to said above mentioned contract, applicants and any of them will furnish to Sureties, upon request and at such reasonable intervals of time as Sureties may designate, financial statements showing the current financial position of the applicant of whom such request for a statement is made."

Morgan's answer in the case at bar denies that he became obligated and specifically required upon specific request or otherwise to furnish Complainant a financial statement showing his current financial position, although he admits signing the indemnity agreement which alleges that he and Hyde were partners under the trade name of Hyde Construction Company. However, the final decree in Cause

No. 66,254 finds that the said bond application and indemnity agreement is ". . . valid and binding upon said defendants . . .", among whom is the defendant, E. E. Morgan. As hereinbefore stated, said decree has been affirmed by the Supreme Court of Mississippi.

I must take the position that Morgan is estopped to claim the privilege against self-incrimination. As an inducement to USF&G to issue the performance bond on the Shively, Kentucky, contract, he agreed to the terms of the indemnity agreement and the bond application, among which terms is the obligation to furnish USF&G financial statements showing his current financial position upon request. Thus, by contract, he is estopped by waiver to claim the privilege, and is obligated to make a disclosure of his financial condition.

In Wigmore on Evidence (McNaughton Revision, 1961), Sec. 2275, p. 453, the following is stated:

> "It has never been doubted that the privilege against self-incrimination, like all privileges, is waivable."

And on page 453, *op. cit.*, this text goes on to state the following:

> "The promise to waive may be embodied in an express contract or a contract implied by the conduct of the parties."

In the case of United States v. Field et al., 193 F. 2d 92, decided by the United States Court of Appeals, Second Circuit, on October 30, 1951, the question before the Court was whether the defendants had waived their rights to the privilege against self-incrimination. In that case, Frederick V. Field, Dashiell Hammett, and W. Alphaeus Hunton were found guilty of contempt in the United States District Court for the Southern District of New York for

refusing to answer questions and to produce certain books and records before the Court on forfeiture of bail for fugitive officers of the Communist Party who had been convicted of violating the Smith Act. On appeal the principal question was whether defendants' constitutional rights under Amendment V of the United States Constitution had been violated through the lower Court's action.

The action against these defendants was an aftermath of the affirmance by the Supreme Court in the case of Dennis et al. v. United States, 341 U.S. 494, 71 S.Ct. 857, 95 L.Ed. 1137. In that case eleven members of the Communist Party of America were convicted for violation of the Smith Act (18 U.S.C. Sec. 2385). The said eleven had been enlarged on bail in the sum of $20,000.00 each, furnished by the "Bail Fund of the Civil Rights Congress of New York", pending the appeal. Field, Hammett and Hunton were three of the five trustees of the said Fund. When the District Court received the mandate from the highest Court finally affirming conviction, it ordered the surrender of the defendants. Seven of them appeared and were imprisoned. Four of them did not appear, and when a bench warrant did not produce them, their bail was declared forfeited. The District Court then directed the appearance of the bondsmen and trustees and officers of the Bail Fund which had acted as surety. Field, Hammett and Hunton, trustees, refused to answer certain questions and to produce certain books and records of the Bail Fund and were cited for contempt. They received imprisonment for specified times, or until they purged themselves of contempt.

The question of the production of certain books and records was easily disposed of by the Court, since the defendants were trustees of the Fund and were acting as representatives of a group rather than in their own purely private or personal interests. In the case of United States

v. White, 322 U.S. 694, 699, 64 S.Ct. 1248, 1251, 88 L.Ed. 1542, 152 A.L.R. 1202, the Court upheld the conviction for contempt of a custodian of books of a labor union, stating that official records held "in a representative rather than in a personal capacity cannot be the subject of the personal privilege against self-incrimination, even though production of the papers might tend to incriminate them personally."

As to the questions propounded to the defendants, which they refused to answer on the grounds of privilege, the Court viewed the situation from the aspect of the nature and extent of the obligation they had assumed in relation to the bail. The Court found that the sureties were, in fact, jailers of the four fugitives and that the questions asked them were pertinent to the discovery of the whereabouts of the fugitives; in other words, the Court found that *an obligation existed on the parts of the defendants to produce the fugitives or to discover clues to trace down their whereabouts, and that such an obligation cannot be defeated by the claim of privilege.* In so finding, the Court went on to state the following:

> ". . . Certainly the objective of the judge in asking (the questions propounded) was clearly within these limits; answers to them, while only remotely and at best unclearly dangerous to appellants, were potentially capable of providing direct assistance to his inquiry. Hence, repeated refusals in repudiation of the definite responsibility thus assumed were properly visited with the customary penalties exacted for defiance of a court acting in the normal exercise of its appropriate functions."

In arriving at its conclusion, the Court stated as follows regarding the privilege against self-incrimination:

> "Dean Wigmore states that this privilege, like others, *should be subject to relinquishment by con-*

> *tract, express or implied*, in advance or retrospectively, and cites in support such cases as Green v. Weaver, 1 Sim., Ch., 404; Hickman v. London Assur. Corp., 184 Cal. 524, 195 P. 45, 18 A.L.R. 742; Swedish-American Tel. Co. v. Fidelity & Casualty Co., 208 Ill. 562, 70 N.E. 768 . . ." (Emphasis added).

It has been stated that the interrelation between Amendments IV and V of the Federal Constitution is such that the two amendments "run head-on into each other". The case of Zap. v. United States, 328 U.S. 624, 90 L. Ed. 1477, is in apposition to the case *sub judice* because, as stated by Mr. Justice Douglas, ". . . the law of searches and seizures as revealed in the decisions of this Court is the product of the interplay of the Fourth and Fifth Amendments . . .". In *Zap*, the Government sought to introduce a check which, without doubt, was incriminating evidence against the appellant. The Court found that Zap's contract with the Navy Department waived the Constitutional privilege as to the right of privacy and made admissible in evidence all incriminating facts. In that case, the Court, speaking through Mr. Justice Douglas, stated as follows:

> ". . . (P)etitioner's contract with the Navy Department provided: 'The accounts and records of the contractor shall be open at all times to the Government and its representatives, and such statements and returns relative to costs shall be made, as may be directed by the Government.'
>
> * * *
>
> "As we have pointed out in Davis v. United States, No. 404, decided this day (328 U.S. 582, ante, 1453, 66 S.Ct. 1256), *the law of searches and seizures as revealed in the decisions of this Court is the product of the interplay of the Fourth and Fifth Amendments. But these rights may be waived.* And when petitioner, in order to obtain the government's business, specif-

ically agreed to permit inspection of his accounts and records, *he voluntarily waived such claim to privacy which he otherwise might have had as respects business documents related to those contracts . . .*

* * *

"Though consent to the inspection did not include consent to the taking of the check, there was no wrongdoing in the method by which the incriminating evidence was obtained. *The waiver of such rights to privacy and to immunity as petitioner had respecting this business undertaking for the Government made admissible in evidence all the incriminating facts.*" (Emphasis added).

In *Zap* the decision was vacated, but on the grounds that there were no women on the grand jury which returned the indictment. 330 U.S. 800, 91 L. Ed. 1259.

In the case at bar, it is clear that USF&G has a right to a discovery as to Morgan's assets. He is estopped by contractual waiver to refuse to answer on the ground of self-incrimination.

This is not to say that Morgan must answer that portion of paragraph 8 of the amended bill which states ". . . defendant has concealed his assets and resorted to other devices for the purpose of hindering, delaying and defrauding complainant of its rights as a judgment creditor . . .", for the reason that complainant's inquiry must be confined within the limits or boundaries of Morgan's duty to inform it as to the nature, value, amounts, and whereabouts of his assets, only, since such was the nature of the contractual agreement. To hold otherwise would, in my opinion, possibly deny the right of immunity from self-incrimination in view of Section 2252, Code of 1942, Recompiled.

On June 21, 1967, during the current term of Court, I rendered a decree in this matter which required Morgan to fully answer paragraph 8 of the amended bill in accord with Section 1291, as amended, Code of 1942, Recompiled. On June 26, 1967, Morgan's Solicitor filed a motion for a reconsideration of Defendant's claim of privilege, which motion was overruled by order rendered on the same day. However, in view of what has been said in this opinion, a supplemental order on Defendant's motion for reconsideration will be drawn so as to relieve Defendant from answering that portion of paragraph 8 of the amended bill which reads as follows:

> ". . . Complainant avers upon information and belief that defendant has concealed his assets and resorted to other devices for the purpose of hindering, delaying and defrauding complainant of its rights as a judgment creditor . . ."

In my opinion, such supplemental order will in no wise inconvenience the parties, and no enlargement of time will be granted as a result.

George William Haynes
Chancellor

Filed Jul 19 - 1967.
Mrs. Charles A. Scott,
Chancery Clerk
By /s/ Jewell Burton, D.C.

ADDENDUM B

IN THE SUPREME COURT OF MISSISSIPPI

No. 45,195

E. E. MORGAN
Appellant

vs.

UNITED STATES FIDELITY & GUARANTY COMPANY
Appellee

PATTERSON, JUSTICE:

This is an appeal by E. E. Morgan from a decree of the Chancery Court of Hinds County which was entered pursuant to the prayer of a bill of complaint filed by United States Fidelity & Guaranty Company, appellee and cross-appellant.

The gist of the bill of complaint, which is in the nature of a "creditor's bill," is that United States Fidelity & Guaranty Company is a judgment creditor of E. E. Morgan under a 1965 decree of the Chancery Court of Hinds County in the sum of $2,642,568.35, plus attorneys' fees of $125,000*; that as a result of this judgment a lien was created against all of Morgan's assets and properties for the benefit of the complainant; that Morgan was the owner of certain assets and properties which were subject to this lien, but that appellant concealed such assets and property and engaged in a fraudulent course of conduct deliberately designed to hinder, delay, and defraud appellee of the benefits of its lien and thereby evade and defeat the decree against him. The bill further alleges that under the pro-

*This decree was affirmed by this Court on November 7, 1966, in Morgan v. United States Fidelity & Guaranty Co., 191 So.2d 917.

visions of the 1965 decree Morgan was obligated and specifically required, upon request, to furnish complainant a financial statement showing his current financial status. The bill sought specific performance of this obligation. Additionally, the bill averred that Morgan had a considerable amount of money and other assets, the location, value and particulars of which were unknown to the complainant, and which should in justice and equity be applied to the satisfaction of the judgment against Morgan. The bill contained a detailed prayer for relief, including a prayer for discovery of Morgan's assets and the appointment of a receiver.

In advance of filing his answer, Morgan, by leave of court, filed a special plea of res judicata, merger and estoppel, based upon the judgment in the parent case. After a hearing, the plea of res judicata was overruled and Morgan was granted leave to plead further. Thereupon he filed his answer which incorporated (1) a general demurrer, (2) a plea of nonjoinder of necessary parties, (3) a plea of res judicata, merger and estoppel by the former judgment, and (4) a denial of the legality of the writ of execution.

Paragraphs 8 and 9 of the bill of complaint are as follows:

(8)

> Complainant further avers that the money judgment in favor of complainant against defendant is and remains in full force and effect and has been affirmed by the Mississippi Supreme Court and there is now actually due to complainant thereon the principal amount of $2,968,962.11, together with lawful interest thereon from the date of the rendition thereof, together with the 5% damages provided by Section 1971, Mississippi Code of 1942, plus attorneys' fees of $25,000 allowed by the Supreme Court. Said judgment has

been duly enrolled and constitutes a lien on the property of defendant. Complainant is informed and believes, and upon such information and belief avers that defendant has a considerable amount of money and of legal and equitable debts, claims and demands due to him from different persons, the names of whom are unknown to complainant, and that said defendant has a large amount of oil, gas and mineral interests and other interests in real estate, stocks of different kinds, securities, promissory notes and other evidences of debt, and other personal property, either in his possession or held in trust for him by others, the situation, value and particulars of which are unknown to complainant, and which ought in justice and equity be applied to the satisfaction of the aforesaid money judgment. Complainant avers upon information and belief that defendant has concealed his assets and resorted to other devices for the purpose of hindering, delaying and defrauding complainant of its rights as a judgment creditor, and complainant has no plain, adequate, speedy and complete remedy at law.

(9)

Complainant avers that in equity and good conscience the assets and property of the defendant should be applied to the satisfaction of complainant's judgment against said defendant, and defendant should be compelled to discover, set forth and disclose all the estate, real and personal, of every description, including goods, chattels, money, book accounts, notes, bonds, mortgages, securities, evidences of debt and choses in action belonging to said defendant, whether standing in his name or in the name of or in the hands of any other person or persons for his use or in trust for him, and the names of the persons who have the possession, custody or control of such real or personal property.

In answering these allegations Morgan admitted the validity and finality of the money decree and that it constituted a lien on his assets, but declined to answer the remaining

allegations of Paragraph 8, stating on oath that an answer in this regard might tend to incriminate him. He expressly invoked the privilege against self-incrimination under the Fifth and Fourteenth Amendments to the Federal Constitution and Article 3, Section 26, Mississippi Constitution (1890).

A motion was filed by the complainant for determination of defendant's claim of privilege to refuse to answer. A preliminary hearing was held and the claim of privilege was rejected by the court on the premise that it had not been made apparent that a full answer would incriminate the appellant. Therefore, Morgan was ordered to answer on penalty of having the unanswered allegations of the bill taken as confessed.

Thereupon Morgan filed a supplemental answer under oath which reiterated his claim of the privilege against self-incrimination and continued to decline to answer the allegations of Paragraphs 8 and 9, answering in regard thereto as follows:

> Without admission or denial of implication in the crimes involved, this Defendant states on his oath that he fears that an answer could tend to incriminate him under several Mississippi criminal statutes, to which his attention has been called, including those referred to by his Counsel on said hearing, and that further factual explanation would tend to destroy the privilege which he claims under the Constitution of the United States and State of Mississippi.

Thereafter, the court reconsidered its order directing an answer to be filed and acknowledged the applicability of Mississippi Code 1942 Annotated Section 2252 (1956), entitled "Larceny—removing property subject to lien out of the county—selling," to a judgment lien. It held that the allegations of concealment in the bill of complaint were

sufficient to bring the answer within the constitutional privilege against self-incrimination and that this privilege did extend to an answer in chancery. The court concluded, however, that there had been a specific contractual waiver of the constitutional privilege under the terms of a bond application which provided that appellant would present a financial statement, on request, to the surety companies involved in that particular project. United States Fidelity & Guaranty Company was one of these companies.

Nevertheless, the chancellor upheld the claim of privilege as to that portion of the complaint which stated: ". . . defendant has concealed his assets and resorted to other devices for the purpose of hindering, delaying, and defrauding complainant of its rights as a judgment creditor." It was the opinion of the chancellor that "To hold otherwise would . . . possibly deny the right of immunity from self-incrimination in view of Section 2252, Code of 1942, Recompiled," and that "being forced to answer . . . runs head-on into Section 2252 of the Code which does make such action a crime." The court further ruled that ". . . such averment shall not be taken as having been admitted or confessed by reason of defendant's failure to make answer thereto, nor shall it be considered that defendant has denied said above quoted averment of the Bill of Complaint." Other than the above statement the court reconfirmed its prior order and held that each averment of Paragraph 8 should be taken as admitted.

Thereafter, the hearing was held on the complaint and answer, including the pleas incorporated therein. The demurrer, plea of nonjoinder, plea of res judicata, merger and estoppel by judgment, were all preliminarily overruled. At the trial the complainant presented detailed evidence in support of its bill of complaint. Morgan could not be located for service of process, did not appear at trial, did not testify or offer testimony, and rested his case.

At the conclusion of the hearing the court held (1) that the creditor's bill was not maintainable under Mississippi Code 1942 Annotated Section 1327 (1956), but was proper under the ancient equity practice, (2) that a course of conduct was shown indicating concealment of assets when regard was had to Morgan's failure to testify, (3) that the case did not justify an injunction requiring Morgan to pay the judgment on pain of contempt, (4) that complainant was entitled to a full discovery of identity, status and location of assets of every kind, including the names of persons having possession, custody or control of assets, (5) that a receiver should be appointed for collection of appellant's assets, and (6) that Morgan should be enjoined from disposing of any assets which might be owned by him. As to the discovery feature of the opinion, the chancellor ruled that he would require the appellant to furnish a financial statement and that in any event the complainant was entitled to a full discovery, stating: ". . . and whether this be done by a statement by way of discovery or by a financial statement, I think it matters very little." A decree was taken in accord with this opinion from which Morgan appeals.

The court allowed supersedeas of those portions of the final decree which required the filing of financial statements and the making of discovery. Otherwise the application for supersedeas was denied.

On September 11, 1967, over a month after the entry of the final decree of August 7, 1967, appellant filed two motions. One motion was to vacate the final decree as being void, and the other was to disqualify and remove Frank J. Buchanan, the appointed receiver. The first motion was primarily addressed to the jurisdiction of the court. It urged that there had been less than fifteen days between the issuance of the writ of execution and the return

date in violation of the requirements of Mississippi Code 1942 Annotated Section 1900 (1956). This motion was overruled as the court was of the opinion that since Morgan had perfected an appeal prior to the filing of the motions, it had no jurisdiction to vacate its prior final decree though the court expressed itself as without jurisdiction in the first instance.

With regard to the second motion, the court ruled that the receivership was proper and necessary and therefore should be continued. However, the receiver's power to pursue and collect Morgan's assets, granted by the decree of August 7, 1967, was ordered to be held in abeyance and the receiver was directed to exercise no powers whatsoever except the following: "(a) to hold and preserve the assets which have heretofore been or may hereafter be conveyed and delivered to him as receiver, (b) to make disposition thereof only after first having obtained an order of this Court specifically authorizing such disposition, and (c) such other powers and authority as may, from time to time, be granted by this Court." It was further ordered that in the event the decree is affirmed by the Supreme Court of Mississippi, the receiver shall have and may exercise all of the powers originally granted by the decree. From the latter portion of this decree United States Fidelity & Guaranty Company perfected its cross appeal.

The principal questions presented by the direct appeal, which may also be considered as assignments of error, are:

1. Is a creditor's bill maintainable without a legal execution, followed by a return of nulla bona?

2. Can discovery be compelled against the claim of a privilege against self-incrimination under the Federal and State Constitutions?

Subordinate questions presented are:

1, The validity of the decree for specific performance.

2. The propriety of the appointment of appellee's agent as receiver with broad visitatorial and inquisitorial powers.

The cross-appellant, United States Fidelity & Guaranty Company, assigns as error, among other things, that the lower court erred in holding and directing that any of the powers of the receiver should be held in abeyance pending decision by the Supreme Court.

The first assignment of error is based upon the appellant's September 11, 1967, motion to set aside the final decree of the court because jurisdiction was never acquired due to irregularities in the issuance of a writ of execution and its "nulla bona" return, and therefore the court had no authority to enter a decree. The appellant argues in support of the motion that the issuance of a writ of execution, with a nulla bona return, is the only manner other than under the provisions of Mississippi Code 1942 Annotated Section 1327 (1956), in which the chancery court can acquire jurisdiction to hear a creditor's bill.* The chancellor was of the opinion that the appellant's motion was meritorious. He expressed the conviction that the writ had been returned less than fifteen days after it was issued and was void under the provisions of Mississippi Code 1942 Annotated Section 1900 (1956), and therefore the court had lacked jurisdiction to hear the bill in the first instance. However, he stated: "(T)his Court has no jurisdiction to

*This motion asserted, in addition, that the writ of execution had been executed against only one judgment debtor, appellant, although the judgment was against several parties, including R. W. Hyde, and therefore was in violation of Miss. Code 1942 Ann. §1901 (1956). This argument is not persuasive since (1) the appellee had separate and several judgments against appellant and (2) Hyde surrendered all assets which had not been taken over by appellant.

decide the questions presented by movant regarding jurisdiction *vel non,* since this case is on appeal to the Supreme Court of Mississippi. . . ."

It is our opinion that the chancellor's conclusions were erroneous except as to the loss of jurisdiction due to the perfection of this appeal. One of the greater maxims of equity is that it delights to do complete justice and not justice by halves. In discussing this principle this Court stated in *Shaw* v. *Owen,* 229 Miss. 126, 132-33, 90 So.2d 179, 181 (1956):

> It is settled beyond question in this jurisdiction that where a suit is brought in the chancery court and the court takes jurisdiction on any one ground of equity, it will proceed in the one suit to a complete adjudication and settlement of every one of all the several disputed questions materially involved in the entire transaction, awarding by a single comprehensive decree all appropriate remedies, legal as well as equitable, although all the other questions involved would otherwise be purely of legal cognizance . . . Griffith's Chancery Practice, Sec. 28; McClendon v. Mississippi State Highway Commission, 205 Miss. 71, 38 So.2d 325; Myers v. Giroir, Miss., 84 So.2d 525; Duvall v. Duvall, Miss., 80 So.2d 752.

This principle has been held to apply, though the equitable ground on which the court obtained jurisdiction fails, and only strictly legal matters remain for determination. In *Duvall* v. *Duvall,* 224 Miss. 546, 554-55, 80 So.2d 752, 755 (1955), we held:

> "And in this state, the rule goes even to the extent that if the ground of equity fail under the proof, the cause may still be retained to a complete final decree on the remaining issues although the latter present legal subjects only and the decree would cover only legal rights and grant none but legal remedies—that

having taken jurisdiction the power of the court to administer full relief is limited by nothing but justice itself."

In this cause the following types of relief were sought by the appellant's bill of complaint: specific performance of contractual obligations, discovery, appointment of a receiver, and the issuance of an injunction. In Griffith, Mississippi Chancery Practice Section 24 (2d ed. 1950) a number of subjects are set out over which a court of equity can assume jurisdiction. Among these are suits involving the specific performance of a contract, appointment of a receiver, discovery, and injunctive relief. We conclude that if the chancery court lacked jurisdiction to entertain this suit as a common law creditor's bill, there were allegations which put in issue other theories upon which the court could properly base its jurisdiction. We think it evident that the prayer in the bill of complaint for the appointment of a receiver was sufficient to vest the chancery court with jurisdiction and having once acquired jurisdiction, it extended to all issues in the case. *See* Shaw, *supra,* and Duvall, *supra,* and cases cited therein. We are of the opinion that this assignment of error is not well taken.

We think it appropriate, however, to comment on the lower court's opinion in regard to the manner in which a creditor's bill may be brought in the chancery court. Prior to the enactment of Mississippi Code Sections 1843, 1844, and 1845 in 1880 the only way in which a creditor's action could be maintained in chancery was by reducing a debt to a judgment in a court of law, having a writ of execution issued on the judgment, followed by a nulla bona return thereon. Once this was accomplished a creditor had run the gauntlet of exhausting his remedies at law and might thereafter entreat the power of equity to grant aid in his behalf. Our cases in regard to this procedure seem

to be in accord. In *Brown Bros. & Co.* v. *Bank of Mississippi*, 31 Miss. 454, 458 (1856), this Court stated:

> It is universally agreed that a creditor cannot go into a court of equity—until he has first obtained a judgment at law upon his debt, and issued execution, and had a return of "nulla bona."

The reason for these strict requirements seems to have been based on problems of jurisdiction rather than procedure. The early case of *Parish & Co.* v. *Joseph C. Lewis*, 1 Freeman 299, 306-07, explained the situation as follows:

> . . . [I]f you wish to reach legal assets of your debtor, and to remove obstacles which obstruct your course at law, it is sufficient that you show a judgment, creating a lien upon those assets; but if you wish to reach equitable assets, or other things not subject to execution at law, you must show that you have exhausted your remedies at law, by a return of an execution unsatisfied, as the foundation of your right to come into this court. In such case, the complainant's right to relief in this court depends upon his having run his execution at law without being able to satisfy his judgment. It is not a mere technical objection, but goes to the very foundation of the suit, and is not waived even by a general answer. The complainant must show an execution returned unsatisfied, and no state of facts will excuse such a return. Brinkerhof v. Brown, 4 John. Ch. R. [N.Y.] 671, 687; McElwain v. Willis et al. 9 Wendall [N.Y.] 548; Screven v. Bostick, 2 McCord's C. R. [S.C.] 416 [16 Am.Dec. 664]; Hadden v. Spader, 20 John R. [N.Y.] 554; Moore v. Young, 1 Dana's R. [Ky.] 516.

From these early cases it is apparent that the primary function of a 'nulla bona" return on a writ was to show an exhaustion of legal remedies, so that a court of equity could assert jurisdiction.

In 1880 the legislature enacted the forerunner of what is now Mississippi Code 1942 Annotated Section 1327 (1956), to ". . . prevent the necessity of a creditor resorting first to a court of law to recover a judgment and then going into equity to secure its satisfaction. . . ." Griffith, Mississippi Chancery Practice Section 500 (2d ed. 1950). The statute reads in part as follows:

> The said court shall have jurisdiction of bills exhibited by creditors who have not obtained judgments at law, or, having judgments, have not had executions returned unsatisfied, whether their debts be due or not, to set aside fraudulent conveyances of property, or other devices resorted to for the purpose of hindering, delaying or defrauding creditors; and may subject the property to the satisfaction of the demands of such creditors *as if complainants had judgments and execution thereon returned "no property found."* (Emphasis ours.)

It is evident from the statute that it had profound effects on the prerequisites for the maintenance of a creditor's bill. The procedure of obtaining a writ of execution and a nulla bona return was no longer necessary where sufficient facts could be pled to bring the cause within the purview of Section 1327. We are of the opinion that since the legislature has provided a means whereby a creditor can enter a court of equity by an appropriate bill of complaint, the requirement that he must resort to the more involved and antiquated common law procedure is no longer absolute and controlling. Here the complainant inter alia specifically alleged that appellant had "resorted to other devices for the purpose of hindering, delaying, and defrauding complainant of its rights as a judgment creditor." These are the precise words contained in Section 1327 and we think when taken in conjunction with other allegations, are sufficient to state a cause of action thereunder.

We are of the opinion that the court had jurisdiction in this case, and the fact that the nulla bona return was not made within the time prescribed by statute, did not divest the court of its jurisdiction. We do not mean by the foregoing to hold that a complainant cannot resort to the common law method to establish jurisdiction in a creditor's bill, but this procedure is no longer exclusive, as an action in the nature of a creditor's bill is also maintainable under Section 1327.

The second predominant question of the suit is concerned with whether the constitutional privilege against self-incrimination afforded under the Fifth and Fourteenth Amendments to the Constitution of the United States and under Article 3, Section 26 of the Mississippi Constitution of 1890, applies in civil actions for discovery or to enforce disclosures under a bill of complaint which requires answer under oath, and which is directed by a final decree. If the constitutional privilege is applicable, we must also reach the question of whether it was waived through estoppel.

The peculiar facts of this case are of particular import in considering the second assignment of error. The suit was brought to enforce a prior decree of the chancery court which adjudicated that complainant is entitled to specific performance of the obligations assumed by appellant under each of the various bond applications and indemnity agreements signed by him. It is a civil suit by a judgment creditor to enforce rights under an equity decree. It thus distinguishes itself from the cases cited by the appellant which relate to grand jury investigations and criminal cases. The privilege against self-incrimination in criminal prosecutions is absolute unless effectively waived. However, in civil cases the privilege is not so unequivocal. As a result there are material differences in the rules governing the invocation of the privilege in criminal and civil

cases. The following illustrations point to some of the differences. An accused in a criminal case may not be required to take the stand or give any testimony. To the contrary, a witness, if called, in a civil case must take the stand and answer all questions except those which would require him to give incriminating evidence. U. S. v. Housing Foundation 176 F.2d 665 (3d Cir. 1949) and 98 C.J.S. *Witnesses* § 441 (1957). Additionally, an adverse inference can be drawn from a defendant's refusal to testify in a civil case whereas no comment or inference might be drawn from the failure of a defendant in a criminal case so to do. In *Duratron Corp.* v. *Republic Stuyvesant Corp.*, 95 N.J. Super. 527, 533, 231 A.2d 854, 857 (1967), it is said:

> No constitutional protection is absolute. Traditionally, the courts have weighed each alleged assault on a constitutional right by comparing the social values, public or private, attending the measures impugned as invalid, with the degree of hazard if any to which the constitutional right or privilege was subjected by such conduct. See Camara v. Municipal Court, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967). The interest of the general public in the fair adjudication by courts of civil disputes between citizens ranks very high in the American polity. The permissible drawing by the factfinder of an inference of inability truthfully to deny a civil claim from a defendant's failure to testify as to relevant facts within his personal knowledge which might refute the evidence adduced against him, is a logical, traditional and valuable tool in the process of fair adjudication. It subserves private justice. We conclude that it does not impair the privilege against self-incrimination.

Moreover, the claim of privilege in a civil case is to be determined by the court and not by the witness as in a criminal case. State v. Myers, 244 Miss. 778, 146 So.2d 334 (1962); Hoffman v. U. S., 341 U.S., 479, 71 S.Ct. 814, 95 L.Ed 1118 (1951); and Rogers v. U. S., 340 U.S. 367, 71

S.Ct. 438, 95 L.Ed. 344 (1951). The yardstick of adjudication to be used by the courts in ruling upon the privilege in a civil case is whether there is a real and substantial hazard of incrimination resulting from a witness's answer to a bill of complaint or from his testimony in open court. See *Marchetti* v. *U. S.*, 390 U.S. 39, 53, 88 S.Ct. 697, 705, 19 L.Ed.2d 889, 901 (1968), wherein it is stated:

> The central standard for the privilege's application has been whether the claimant is confronted by substantial and "real," and not merely trifling or imaginary, hazards of incrimination. . . .

The chancellor first ruled there was not a substantial and real hazard of self-incrimination involved in the answer under oath, the discovery or the testimonial requirement of the decree; however, on reconsideration he was of the opinion that the claim of privilege should be upheld as to the bill of complaint wherein it states: ". . . Defendant has concealed his assets and resorted to other devices for the purposes of hindering, delaying, and defrauding complainant of its right as a judgment creditor." It was his opinion that: "To hold otherwise would . . . possibly deny the right of immunity from self-incrimination in view of Section 2252, Code of 1942, Recompiled," and that "being forced to answer . . . runs head-on into Section 2252 of the Code which does make such action a crime."

In analyzing the chancellor's findings of fact and their relation to Mississippi Code 1942 Annotated Sections 2250 and 2252 (1956), which make criminal the acts of removing property subject to liens out of the state or out of the county without consent or with intent to defraud, we are unable to say that he was manifestly wrong as to the facts or that he misapplied the law with regard to Paragraphs 8 and 9 since the appellant was permitted the privilege as it related to these paragraphs of the bill of com-

plaint. Though we think the chancellor's opinion in regard to Paragraphs 8 and 9 is contradictory to the decree permitting discovery, we cannot state that he erred in legal principle, the error, if any, consisting of the lack of conformity between the decree and the opinion. We conclude this specification of error is not well taken.

We do not reach the broad question of the application of the principles to the other aspects of the suit, i.e., answer under oath, discovery of assets subject to judgment, or testimony as to the location thereof, since it is not necessary to the opinion in view of our subsequent holding that there was a waiver of the privilege.

The next question for consideration and perhaps the most cogent of the suit is whether the appellant waived his constitutional privilege against self-incrimination. There is no doubt that an individual may waive the personal protections and privileges provided by the United States Constitution. See Sheppard v. Barron, 194 U.S. 553, 24 S.Ct. 737, ..., 48 L.Ed. 1115 (1904). He may, of course, also waive the personal protections and privileges afforded by the Mississippi Constitution (1890). Waiver may be accomplished by a specific written agreement or by a course of conduct which indicates an intention to forego the privilege. The methods by which the privilege may be lost are discussed at length in 8 Wigmore on Evidence Section 2275 (McNaughton Rev. 1961) where it is stated:

> Waiver: (a) By contract. It has never been doubted that the privilege against self-incrimination, like all privileges (§§ 2196 and 2197 supra), is waivable. There are two possible ways of waiving: (a) By contract or other binding pledge before trial, or (b) by voluntarily testifying in the case (§2276 infra). As to the first of these ways, may a waiver be made irrevocably by contract before trial?

Unless the contract is one which by its circumstances has come within the doctrine of duress or oppression, and is thus voidable on general principles of contract, there is no reason in its present aspect why it should not be binding. The promise to waive may be embodied in an express contract or in a contract implied by the conduct of the parties. In either case, however, two distinctions should be drawn:

(1) A bare contract to waive the privilege will not be enforced specifically. Rather, it will be enforced, where possible, by indirect sanctions similar to those (short of arrest and contempt) available to punish civil litigants who refuse to comply with orders to make discovery—e.g., dismissal of the action. Or the sanction may be loss of employment or of pension or of the right to do business with the government.

(2) *Where there are not only the ingredients of an express or implied contract to waive privilege but also a fiduciary relation or other elements of public policy making recognition of privilege unconscionable, the waiver of privilege may be specifically enforced and the witness held in contempt for failure to make disclosure.* . . . (Emphasis ours.)

These principles have been applied in a strikingly similar situation by the United States Supreme Court. In *Zap v. U. S.*, 328 U.S. 625, 66 S.Ct. 1277, 90 L.Ed. 1477 (1946), we find:

As we have pointed out in Davis vs. United States, No. 404, decided this day [328 US 582, ante, 1453, 66 S Ct. 1256], the law of searches and seizures as revealed in the decisions of this Court is the product of the interplay of the Fourth and Fifth Amendments. But those rights may be waived. And when petitioner, in order to obtain the government's business specifically agreed to permit inspection of his accounts and records, he voluntarily waived such claim to privacy

which he otherwise might have had as respects business documents related to those contracts. 328 U.S. at 628, 66 S.Ct. at 1279, 95 L.Ed. at 1481-82.

The elements of public policy necessary for the application of estoppel are apparent in the *Zap* case since the contracts involved there were with the United States Navy. We think that sufficient fiduciary obligations and questions of public policy exist in this instance to uphold the judgment of the lower court which held that the appellant had specifically waived the privilege.

This Court has heretofore adjudicated that the appellant is obliged to perform each and every obligation assumed by him under each of the indemnity agreements. Morgan v. U.S.F. & G., 191 So.2d 917 (Miss. 1966). *See also* Morgan v. U.S.F. & G., 191 So.2d 851 (Miss. 1966), of interest to the former case and this opinion. In the first *Morgan* case the agreement of indemnity which was entered into with relation to a construction project in Shively, Kentucky was expressly passed upon by the lower court and held to be binding upon Morgan, and this decree was upheld by this Court. By necessity the lower court must have also considered in connection therewith the letter of Morgan accepting the conditions of the Shively application agreement. These instruments, hereinafter detailed, give rise to the equivalent of a fiduciary relationship, that of a principal and surety. 59 Am. Jur. § 221 (1944). There can be little doubt that the surety is entitled to be protected by his principal, in this instance the appellant Fidelity & Deposit Co. of Maryland v. Deposit Guaranty Bank & Trust Co., 164 Miss. 286, 144 So. 700 (1932) and Ames v. Dorrah, 76 Miss. 187, 23 So. 768 (1898).

In January 1960 R. V. Tyler Co., Inc. and Hyde Construction Company executed an "Application for Performance and Payment Bonds and Indemnity Agreement" Form No. 1. Its purpose was to obligate the appellee as a surety for the performance of a contract entered into by

Hyde Construction Company and the City of Shively, Kentucky. The appellant obligated himself to the payment of this bond by letter as follows:

"Date January 25, 1960

"United States Fidelity and Guaranty Company
Baltimore, Maryland

National Surety Corporation
San Francisco, California

Gentlemen:

Re: Your Co-surety Bond Covering Contract $2,721,419.00—R. B. TYLER COMPANY, INC., & HYDE CONSTRUCTION COMPANY, A JOINT VENTURE

Favor: City of Shively, Kentucky
For construction of Sewage System for City of Shively, Ky., Contracts 1, 2, 3, 4, 5 & 6

Contract & Bond dated January 25, 1960

Attached is 'Application for Performance and Payment Bonds and Indemnity Agreement' on Form No. I duly executed by R. W. Tyler Company, Inc., a Kentucky corporation, Louisville, Kentucky and R. W. Hyde, Jr., an individual d/b/a Hyde Construction Company, Jackson, Mississippi.

In consideration of your executing as co-sureties the above described bond or bonds, I hereby agree as follows:

That the signing and furnishing of this letter obligates me to the terms and conditions of the enclosed 'Application for Performance and Payment Bonds and Indemnity Agreement' on Form No. 1 just as though I were named as one of the applicants therein and my signature were duly affixed thereto.

Yours very truly,

/s/ E. E. Morgan
E. E. Morgan"

It is apparent that this letter is the product of an astute business man. He, of course, knew or should have known that one of the terms of the application was that the surety would have access at all reasonable times to the books and records of the applicant. Another term of the application is: ". . . applicants and any of them will furnish to sureties, upon request and at such reasonable intervals of time as sureties may designate, financial statements showing the current financial position of the applicant of whom such request or statement is made." In view of the terms of this application, appellant's letter acknowledging acceptance of such terms, and our prior opinion that the Shively agreement was a valid and binding instrument, we do not find it necessary to discuss whether or not the technical requirements of a waiver or estoppel were complied with. The case stands in a posture similar to that which existed in *Sheppard, supra,* wherein the Court held that certain property owners had waived or were estopped to assert a denial of due process of law. In explaining the Court said:

> Provisions of a constitutional nature, intended for the protection of the property owner, may be waived by him, not only by an instrument in writing, upon a good consideration, signed by him, but also by a course of conduct which shows an intention to waive such provision, and where it would be unjust to others to permit it to be set up. . . . 194 U.S. at 568, 29 S.Ct. at 742, 48 L.Ed. at 1120-21.
>
> * * *
>
> . . . A defense of this nature and upon these facts need not be placed entirely upon the strict and technical principles of an estoppel. While it partakes very strongly of that character, it also assumes the nature of a contract, implied from the facts . . . It does not in the least matter what we may call the defense, whether it be estoppel or implied contract, or one partaking of the nature of both. . . . 194 U.S. at 565, 24 S.Ct. at 741, 48 L.Ed. at 1119.

Judgments and decrees are entitled to proper respect when rendered and public policy requires nothing less. The citizenry of the state has the right to expect their orderly enforcement and surely the litigants, who have a direct personal or pecuniary interest in the outcome of a suit, have the basic right to demand the enforcement of the judicial processes. The effectiveness of our entire court system rests upon the court's ability to enforce its judgments; otherwise they would become mere "scraps of paper" evidencing only the good intentions of the court, and reducing its orders and the attempted enforcement thereof to an exercise in futility. The thought pervades that the constitutional privilege is largely related to criminal prosecution, which is only to say that the government or state must prove its case against an accused without the aid of the accused's testimony, if he desires to invoke the privilege. However, in a civil proceeding we express doubt that it was ever intended that the privilege could be transformed into an affirmative device whereby a judgment debtor can effectively thwart the processes of the court. Under the peculiar circumstances of this case, a deliberate course of conduct by a judgment debtor to evade the effects of a lawful judgment, we are of the opinion that the lower court did not err in holding that the appellant waived the right to assert the claim of constitutional privilege. The trial judge was under no duty to broaden the privilege against self-incrimination to a point which would effectively place it beyond waiver. *See* Zap, *supra*, and Crest Catering Co. v. Superior Court, 42 Cal. 110, 398 P.2d 150 (1965).

The next assignment of error is that there can be no specific performance of the contractual provision to produce a financial statement. The appellant contends that there can be no specific performance of this agreement as required by the "Shively" indemnity application since it

is barred by res judicata or estoppel by judgment. The appellant argues that in the former case the appellee expressly sought relief by way of specific performance of the obligations assumed in the several bond applications including the one in question, and that the court declined to grant specific performance. An examination of the decree referred to indicates that the court found to the contrary and in fact adjudicated: "Said defendants are obligated to perform specifically each and every obligation assumed by them under the terms of each of the various bond applications and indemnity agreement signed by them in regard to the jobs and bonds described in the bill of complaint as amended," and the decree specifies the various construction projects for which bonds were sought, one of which was:

"1/25/60	City of Shively, Kentucky	For construction of Sewage System for City of Shively Kentucky; Contracts 1, 2, 3, 4, 5 & 6	$2,721,419.00

The indemnitors on this job being: R. W. Hyde, Jr., E. E. Morgan, Hyde Construction Company, Inc. . . ."

We find no merit in this assignment of error.

The last question presented on direct appeal is the propriety of the judge's action in appointing a former employee of the appellee as receiver for collection of appellant's assets. Appellant vigorously asserts that the receiver should be a completely disinterested party; however, we note a lack of convincing authority to this effect.

In regard to this problem, we find in Griffith, Mississippi Chancery Practice section 474 (2d ed. 1950), the statement that:

> While it is the usual and better practice to appoint as receiver an entirely disinterested person, one indifferent as to all the parties, yet inasmuch as competency and capacity to perform the important duties

> assigned to him in the particular case in hand are requisites, it is within the discretion of the court to appoint one of the parties on good bond, if he stand in no improper relation to the cause. The chancellor acts in this matter upon his own judgment and in his own sound discretion, and is therefore not obliged to accept a person recommended or proposed by the parties; in fact, it may sometimes be his duty not to do so. . . .

We agree with the statement that the chancellor is largely left to his own discretion in selecting a receiver and generally is bound only by the qualification that such individual does not stand in an improper relation to either of the parties. After a close reading of the record we are agreed that the chancellor was well aware of the law in this regard, was satisfied that the individual selected was qualified and found no *improper* relations with either party. In the absence of a proof of abuse of discretion in the appointment of the receiver we uphold the chancellor's action in this regard. We conclude this assignment is not well taken.

The only assignment of error on cross appeal is the action of the lower court in holding certain powers of the receiver in abeyance pending this appeal because of objections to his competence by appellant. There is no need to reach this question in view of our decision that the chancellor was without error in his selection of the receiver. Since the decree of the lower court provides that the full powers of the receiver would be restored if the appeal resulted in an affirmance, which it does, we withhold further comment.

AFFIRMED ON DIRECT AND CROSS APPEALS AND REMANDED.

ETHRIDGE, C.J., AND JONES, INZER, AND ROBERTSON, JJ., CONCUR.

ADDENDUM C

IN THE SUPREME COURT OF MISSISSIPPI

45,195

MONDAY, APRIL 14, 1969, Court Sitting

E. E. Morgan

vs.

United States Fidelity & Guaranty Company

This cause having been submitted at a former Term of this Court on the record herein from the Chancery Court of Hinds County, First District, and this Court having sufficiently examined and considered the same and being of the opinion that there is no error therein doth order and adjudge that the decree of said Chancery Court rendered in this cause on the 7th day of August 1967 be and the same is hereby affirmed in all respects. It is further ordered, adjudged and decreed that on the 13th day of October, 1967, the said Chancery Court entered a decree providing that certain powers conferred on the receiver by the aforesaid decree of August 7, 1967, should be held in abeyance until such time as this Court should determine appellant's appeal from the aforesaid decree of August 7, 1967; that inasmuch as said decree of October 13, 1967 provides that the full powers of the receiver shall be restored if the decree of August 7, 1967 is affirmed by this Court, and since this Court has now affirmed said Decree of August 7, 1967 and said decree of August 7, 1967 is now in full force and effect, the issue raised by the cross-appeal has been resolved; and, therefore this cause is affirmed on cross-appeal.

It is further ordered, adjudged and decreed that appellee do have and recover of and from the appellant, E. E. Morgan, and Western Casualty & Surety Company,

surety on the appeal bond and supersedeas bond of appellant, E. E. Morgan, jointly and severally, all of the costs of this appeal to be taxed, for which let proper process issue.

It is further ordered, adjudged and decreed that no costs are adjudged against appellee, United States Fidelity and Guaranty Company, or against Maryland Casualty Company, the surety on its cost bond, in connection with the cross-appeal of United States Fidelity and Guaranty Company.

It is further ordered, adjudged and decreed that this cause be and the same hereby is remanded to the Chancery Court of the First Judicial District of Hinds County, Mississippi for further proceedings in accordance with that Court's aforesaid decree of August 7, 1967.

MINUTE BOOK "BO: PAGES 524 & 525.

ADDENDUM D

IN THE SUPREME COURT OF MISSISSIPPI

45,195

MONDAY, JUNE 9, 1969, Court Sitting

E. E. Morgan

vs.

United States Fidelity & Guaranty Co.

This cause this day came on to be heard on the Petition for a rehearing filed herein and this Court having sufficiently examined and considered the same and being of the opinion that the same should be denied doth order and adjudge that said petition be and the same is hereby denied.

MINUTE BOOK "BO" PAGE 560.

ADDENDUM E

IN THE CHANCERY COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

No. 71,194

UNITED STATES FIDELITY & GUARANTY COMPANY
Complainant

vs.

E. E. MORGAN
Defendant

EXCEPTIONS TO FINAL DECREE

Now comes the Defendant, E. E. Morgan, by his Solicitors, and files this his exceptions to the Final Decree entered by this Court in this cause and dated August 7, 1967, to the extent that the Defendant is advised is necessary, and for grounds of exception would show the following:

1.

The Defendant respectfully excepts to each and every phrase, sentence and paragraph of said Final Decree on the ground that it is unauthorized in fact and is unauthorized in law. To save prolixity this exception is directed to each and every phrase, sentence and paragraph separately and collectively.

2.

Without waiver of the generality of the foregoing, Defendant specifically excepts to the appointment of the person of Frank Buchanan as receiver, and herein would show that the said Frank Buchanan is a long-standing employee of the Complainant, United States Fidelity & Guaranty

Company, and is in no respect impartial as between Complainant and Defendant, and the said appointee is in fact, as shown by his testimony on the trial of this cause and the pleadings herein, wholly and completely identified with the Complainant.

3.

The said Frank Buchanan in fact stands in an improper relation to this cause.

4.

There has been no showing whatsoever that other competent and capable and disinterested individuals are unavailable for the appointment to this office.

5.

The Defendant further and without waiver of the foregoing specifically excepts to those portions of said Final Decree by which the said Frank Buchanan as receiver is invested with visitatorial and inquisitional powers within and without the confines of the jurisdiction of this Court.

Defendant would show that the powers vested in the receiver violate the due process of law requirements of the Fourteenth Amendment of the Constitution of the United States of America, and Section 14, Article 3, of the Constitution of the State of Mississippi.

6.

Defendant further and without waiver of the foregoing excepts to that portion of the Final Decree whereby the Defendant, E. E. Morgan, is in effect directed to pay a civil debt to said receiver by way of mandatory injunctive relief, for the reason that said mandatory injunction is contrary to law and in violation of the Constitution of the State of Mississippi.

7.

Further without waiver of the foregoing, Defendant excepts to that portion of the Final Decree by which his present attorneys are designated as process agents for Defendant in any subsequent proceedings.

8.

The Defendant E. E. Morgan having heretofore, by appropriate verified pleading, invoked and asserted his constitutional privilege against self-incrimination, does hereby specifically except to Paragraphs 6 and 7 of said Final Decree whereby he, the said Defendant E. E. Morgan, is directed by mandatory injunction to make disclosures, the nature of which has heretofore been made the subject of a claim of said privilege, for the reason that said direction by the Court in the form of a mandatory injunction is in violation of the Fifth and Fourteenth Amendments of the Constitution of the United States of America and Section 26, Article 3 of the Constitution of the State of Mississippi.

These specific exceptions are being filed, with the reservation of an exception to the entire Decree, for the reason that some of the matters specifically excepted to constitute new matter not specifically at issue under the pleadings or submitted to the Court in any adversary hearing or proceeding for the Court's ruling thereon during the course of the trial of this cause on its merits, and for the purpose of further preserving without waiver all points arising out of said Decree for review on appeal, and for the purpose of preserving without waiver the constitutional privileges and immunities vouchsafed to the Defendant under the

Constitution of the United States of America and the Constitution of the State of Mississippi.

Respectfully submitted,

Cox, Dunn & Clark
By /s/ Vardaman S. Dunn
Attorneys for E. E. Morgan

Filed Aug. 8, 1967.
Mrs. Charles A. Scott,
Chancery Clerk
By /s/ Jewell Burton, D.C.

ADDENDUM F

IN THE SUPREME COURT OF MISSISSIPPI

E. E. MORGAN, Appellant,
vs.
UNITED STATES FIDELITY & GUARANTY COMPANY, Appellee.
No. 45,195

ASSIGNMENT OF ERRORS

Now comes Appellant, E. E. Morgan, and assigns the following as errors for review:

1.

The final decree appealed from is invalid in its entirety for the reasons that Appellee, as Complainant in the judgment creditor's bill involved, failed to cause the writ of execution returned nulla bona to be validly issued as required by law and prior to the filing of the original Bill of Complaint.

2.

The Chancery Court erred in declining to sustain Appellant's objections and exceptions to the filing of a financial statement and the making of the discovery called for by the original Bill of Complaint and directed in the final decree, and in ruling that Appellant was not entitled to claim and be protected under the privilege against self-incrimination vouchsafed to him under the Fifth and Fourteenth Amendments to the Constitution of the United States and under Article 3, Section 26 of the Mississippi Constitution of 1890.

3.

That portion of the final decree (especially paragraphs 6 and 7, R. 1148-1149), directing the filing of financial and other discovery statements, entered despite Appellant's claim of the privilege against self-incrimination, is erroneous and invalid and violates the constitutional rights vouchsafed to Appellant under the Fifth and Fourteenth Amendments to the Constitution of the United States and under Article 3, Section 26, of the Mississippi Constitution of 1890.

4.

The Chancery Court erred in appointing Appellee's agent as receiver and erred in conferring on said receiver excessive visitatorial and inquisitorial powers.

5.

The powers granted to the appointed receiver in the form of active pursuit of Appellant without provisions for a right to be heard in relation to the conduct of the receivership denies to Appellant the due process of law guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States and by Article 3, Section 14, of the Mississippi Constitution of 1890.

6.

The Chancery Court erred in overruling Appellant's plea of res judicata, merger and estoppel by judgment in relation to the relief sought by the Complaint in the way of specific performance.

7.

The Chancery Court erred in overruling Appellant's objections to the offer of evidence, oral and documentary, and in admitting evidence over such objections, and the Chancery Court erred in sustaining objections made by Appellee.

8.

The decree is contrary to law, contrary to the Constitutions aforesaid, and contary to the evidence.

Respectfully submitted,

/s/ Vardaman S. Dunn
1741 Deposit Guaranty Bank Building
Jackson, Mississippi
Attorney for Appellant

OF COUNSEL
Cox, Dunn & Clark
1741 Deposit Guaranty Bank Building
Jackson, Mississippi

ADDENDUM G

APPELLANT'S PETITION FOR REHEARING

Appellant, E. E. Morgan, petitions the Court for a rehearing and respectfully submits that constitutional questions arising under the United States and Mississippi Constitutions have been erroneously decided, and more specifically Appellant would show:

1. The Court erred in directing compliance with the order for a testimonial discovery under oath despite the constitutional plea of privilege against self-incrimination.

2. The Court erred in viewing the allowance of the constitutional privilege against testimonial self-incrimination as a challenge to the Court's power to enforce its judgments and in subordinating the privilege to the interest of the judiciary in the collection of money judgments.

3. Given the existence of the constitutional privilege against testimonial self-incrimination, the Court erred in denying application of such privilege on a finding of "waiver" in virtue of a purely private contract document given long before the occasion arose for claiming the privilege.

4. The Court erred in appointing the judgment creditor's agent as a general receiver of Appellant to act as an adversary with broad visitatorial and inquisitorial powers to be exercised both within and without the State of Mississippi.

Appellant again invokes protection of the Fourth, Fifth and Fourteenth Amendments to the *Constitution of the United States* and comparable sections of the State Constitution.

ADDENDUM H

MISSISSIPPI CODE OF 1942

§2250. Larceny—removing property subject to lien out of state.

If any person shall move, or cause to be removed, to any place beyond the jurisdiction of this state, any personal property which shall at the time of such removal be under written pledge, or mortgage, or deed of trust, or conditional sales contract, or lien by judgment, or any other lien in this state, with intent to defraud the pledgee, mortgagee, trustee, cestui que trust, conditional vendor, or creditor, he shall be guilty of a misdemeanor, and, upon conviction, shall be fined not more than one thousand dollars ($1,000.00) or imprisoned in the county jail not more than twelve (12) months, or both.

§2252. Larceny—removing property subject to lien out of the county—selling.

Any person who shall remove, or cause to be removed, or aid or assist in removing from the county in which it may be, any personal property which may be the subject of a pledge, mortgage, deed of trust, conditional sales contract, lien of a lessor of lands, or lien by judgment, or any other lien of which such party has notice, without the consent of the holder of such encumbrance or lien, or who shall conceal or secrete such property, or who shall sell or dispose of the same or any part thereof without the consent of the mortgagee or beneficiary, or conditional vendor, whether any of these acts shall be done before or after the maturity of the debt secured by the lien, and shall not immediately discharge such encumbrance or lien or pay to the holder of such lien or encumbrance the value of such property in event same is less than the amount of such lien or encumbrance, shall, upon conviction, be imprisoned in the county jail not more than one year, or be fined not exceeding the value of such property, or both.

This Form is to be used where all of the joint venturers are parties to the contract and principals in the bond.
Revised to September, 1952.

A47
ADDENDUM I

APPLICATION FOR PERFORMANCE AND PAYMENT BONDS AND INDEMNITY AGREEMENT

Form No. 1

(INSERT NAMES OF JOINT VENTURERS)

R. B. TYLER COMPANY, INC., LOUISVILLE, KENTUCKY

HYDE CONSTRUCTION COMPANY, JACKSON, MISSISSIPPI

hereby jointly and severally apply to the Surety Companies hereinafter named (hereinafter called the Sureties) to execute performance bond , applicants,
in the sum of TWO MILLION SEVEN HUNDRED TWENTY ONE THOUSAND FOUR HUNDRED NINETEEN AND NO/100

($ 2,721,419.00) Dollars, and payment bond in the sum of

ADDENDUM I

(INSERT NAMES OF JOINT VENTURERS)

R. B. TYLER COMPANY, INC., LOUISVILLE, KENTUCKY

HYDE CONSTRUCTION COMPANY, JACKSON, MISSISSIPPI

, applicants,

hereby jointly and severally apply to the Surety Companies hereinafter named (hereinafter called the Sureties) to execute performance bond in the sum of TWO MILLION SEVEN HUNDRED TWENTY ONE THOUSAND FOUR HUNDRED NINETEEN AND NO/100

($ 2,721,419.00) Dollars, and payment bond in the sum of

($) Dollars, required by CITY OF SHIVELY, KENTUCKY

in connection with contract for CONSTRUCTION OF SEWAGE SYSTEM FOR CITY OF SHIVELY, KENTUCKY
CONTRACTS 1, 2, 3, 4, 5, and 6

The Sureties and the amount of liability assumed, or to be assumed, by each on said bonds are as follows:

Name of Surety Company	Amount of Obligation Assumed	
	Performance Bond	Payment Bond
NATIONAL SURETY CORPORATION	$1,360,709.50	
UNITED STATES FIDELITY AND GUARANTY CO.	$1,360,709.50	

The foregoing list of Sureties may be changed by agreement with the Sureties both as to the companies and the amount of obligation of the respective Sureties, and if additional Sureties participate in said bonds either as cosureties or reinsurers, the term "Sureties" as used herein shall include such additional Sureties. The obligation of the undersigned hereunder shall in no way be affected by the failure of any of the Sureties above named to participate in said bonds nor by the reapportionment of the amount of liability assumed by the Sureties.

The applicants hereby represent that the statements herein made as an inducement to the Sureties to execute the bonds herein applied for are true and should the Sureties execute said bonds in consideration thereof, it is hereby agreed by said applicants and their representatives, successors and assigns:

First: To pay the Sureties the sum of SEVENTEEN THOUSAND SEVEN HUNDRED SIXTY TWO AND 45/100 ($ 17,762.45) Dollars as the premium on said bonds for the term of said bonds, which payment shall be made within sixty days after the date of the execution of said bonds. The said premium is based on an estimated contract price of TWO MILLION SEVEN HUNDRED TWENTY ONE THOUSAND FOUR HUNDRED NINETEEN AND NO/100 ($ 2,721,419.00) Dollars. The Sureties will pay commission on said premium for said bonds to such brokers or agents as the applicants may designate as their brokers or agents.

Upon the completion of the work provided for in said contract, if the entire amount of the contract price amounts to more than the sum of TWO MILLION SEVEN HUNDRED TWENTY ONE THOUSAND FOUR HUNDRED NINETEEN AND NO/100 ($ 2,721,419.00) Dollars, said applicants will then pay to the Sureties such additional premium as may be due, computed at the rate fixed for the project. If the entire contract price shall be less than TWO MILLION SEVEN HUNDRED TWENTY ONE THOUSAND FOUR HUNDRED NINETEEN AND NO/100 ($ 2,721,419.00) Dollars, said Sureties will repay to the applicants such portion of the net premium as may have been collected over and above the actual premium earned, computed at the rates fixed for this project, to-wit:

Amount of Contract Price	Unit Rate Per M for Term
$2,721,419.00	$10.00 Per M First $100,000.00 $ 6.50 Per M Next $2,400,000.00 $ 5.25 Per M Next $2,500,000.00

but will not be responsible for refund of any part of the unearned premium which has theretofore been paid as commission to any broker or agent.

all releases, or in enforcing any of the agreements herein contained with reference to said bonds.

Anything to the contrary in this instrument notwithstanding, the liability of each of the applicants and indemnitors to the Sureties shall be limited to the amount of money set opposite their respective names as follows:

Indemnitor	Amount of Obligation Assumed
R. B. TYLER COMPANY, INC.	UNLIMITED AS TO SURETY
HYDE CONSTRUCTION COMPANY	UNLIMITED AS TO SURETY

Third: Said applicants, as contractors, have entered into a joint venture agreement in connection with the performance of said contract and said applicants agree with the Sureties that prior to the execution of the bonds herein applied for, the applicants will deposit in an account or accounts carried in the name of said joint venture in a bank or banks designated by said joint venture and satisfactory to the Sureties, the sum of at least ($) Dollars, being per cent (%) of the estimated contract price, and further agree to deposit in said bank account or accounts all estimates and moneys received by said joint venture in connection with the performance of the said contract, or any matter relating thereto, and said applicants agree that they will not make any disbursement from said fund so deposited except for the purpose of paying necessary expenses and bills incurred in connection with the performance of said contract, without the consent in writing of the Sureties who shall have accepted under the bonds to be executed by them at least per cent (%) of the total liability of all the Sureties under said bonds.

Fourth: The Sureties shall have the right, and are hereby authorized, but not required:

(a) In the event of any abandonment or forfeiture of the contract guaranteed by said bonds, or any breach of said bonds, to take possession of the work under said contract, and at the expense of said applicants to complete or to contract for the completion of the same, or to consent to the reletting or completion thereof by the Obligee in said bonds;

(b) To adjust, settle or compromise any claim, demand, suit or judgment upon said bonds, or any of them, unless the applicants shall request the Sureties to litigate such claim or demand, or to defend such suit or to appeal from such judgment, and shall deposit with the Sureties at the time of such request cash or collateral satisfactory to them in kind and amount to be used in paying any judgment or judgments rendered or that may be rendered, with interest, costs and attorneys' fees;

(c) To fill up any blanks left herein, and to correct any errors in the description of any of said bonds, or in said premium or premiums, or in any name or names, it being hereby agreed that such insertions or corrections, when so made, shall be prima facie correct.

Fifth: To assign, transfer and set over, and do hereby assign, transfer and set over to the Sureties, as collateral, to secure the obligations hereunder and any other indebtedness and liabilities of the applicants to the Sureties whether heretofore or hereafter incurred, such assignment to become effective as of the date of said bonds, but only in the event of (1) any abandonment, forfeiture or breach of said contract or of any of said bonds; or (2) of any breach of the agreements herein contained, or (3) of a default in discharging other indebtedness or liabilities when due, or (4) of any assignment by the applicants for the benefit of creditors, or of the appointment of a receiver or trustee for the applicants, whether insolvent or not, unless such receiver or trustee be removed within 10 days; or (5) of any proceeding which deprives the applicants of the use of any of the machinery, equipment, plant, tools, or material herein referred to, but only in the event of such proceeding interfering with the performance of the contract, namely: (a) all the right, title and interest of the applicants in and to all machinery, equipment, plant, tools and materials which are now, or may hereafter be about or upon the site of said work or elsewhere, for the purposes thereof, including materials purchased for or chargeable to such contract which may be in process of construction, on storage elsewhere, or in transportation to said site; (b) all the rights of the applicants in and growing out of said contract in any manner, or any extensions, modifications, changes or alterations thereof, or additions thereto; or in or growing out of said contract or said bonds; (c) all actions, causes of action, claims and demands whatsoever which the applicants may have or acquire against any subcontractor, laborer or material man, or any person furnishing or agreeing to furnish or supply labor, materials, supplies, machinery, tools, or other equipment in connection with or on account of said contract; (d) any and all percentages retained on account of said contract, and any and all sums that may be due under said contract at the time of such abandonment, forfeiture or breach, or that thereafter may become due.

Sixth: That liability hereunder shall extend to and include the full amount of any and all sums paid by the Sureties in settlement or compromise of any claims, demands, suits or judgments upon any of said bonds in good faith under the belief that they or any of them were liable therefor, whether liable or not, as well as any and all disbursements on account of costs, expenses and attorneys' fees, as aforesaid, which may be made under the belief that such were necessary whether necessary or not; provided, however, that the Sureties shall not settle any claim except in accordance with the provisions of Article Fourth, subparagraph (b) hereof.

Seventh: That in the event of payment, settlement or compromise, in good faith, of liability, loss, costs, damages, expenses and attorneys' fees, claims, demands, suits and judgments as aforesaid, an itemized statement thereof, sworn to by any officer of the Sureties, or any of them, or the voucher or vouchers, or other evidence of such payment, settlement or compromise shall be prima facie evidence of the fact and extent of the liability of the applicants, in any claim or suit hereunder, and in any and all matters arising between the applicants and the Sureties.

Eighth: That this obligation shall, in all its terms and agreements, be for the benefit of and protect any person or company, joining with the Sureties in executing any of said bonds as well as any company or companies assuming reinsurance thereupon.

Ninth: That separate suits may be brought hereunder as causes of action accrue, and the bringing of suit or the recovery of judgment upon any cause of action shall not prejudice or bar the bringing of other suits upon other causes of action, whether theretofore or thereafter arising.

Tenth: A representative of the Sureties shall have access at all reasonable times and places to the books and records of the said applicants and to correspondence with the representatives of said Obligee and shall be entitled to receive full information from the applicants and the banks of deposit of the said applicants and shall be given such information as such representatives shall request, all as the same relate to the construction work to be performed by the applicants in connection with the contract hereinbefore mentioned. In case the applicants shall object to any person appointed by the Sureties as their representative, then another person shall be appointed, and if such successor shall not be satisfactory, the Sureties shall select another person, but it shall not be obligatory upon the Sureties to change the third person so selected unless in their judgment it shall be proper to do so. In addition to the above information to be furnished from, and the right given to the Sureties to examine, the books, records, correspondence and bank accounts of applicants as the same relate to said above mentioned contract, applicants and any of them will furnish to Sureties, upon request and at such reasonable intervals of time as Sureties may designate, financial statements showing the current financial position of the applicant of whom such request for a statement is made.

Eleventh: The applicants shall not be released from any of the obligations herein contained by reason of any change, deviation, alteration, or modification of the contract, or of any of said bonds or of this or any other agreement, or by the impairment or suspension of any right or remedy against them or any of them.

Twelfth: That in the event of any suit or legal proceedings being brought against the Sureties, or any of them, on any of the bonds hereinbefore referred to, the Sureties, or any of them, shall have the right to apply to the Court in which said action is brought for an order making the applicants defendants, and said applicants (and each of them) do hereby consent to the granting of such application for making such order and do hereby agree to become such parties defendant and in the event of any judgment being rendered against the said applicant or the Sureties, or any of them, in such action the same judgment shall be rendered against the applicants and each of them.

Second: Subject to the limitations hereinafter named, the undersigned,

R. B. TYLER COMPANY, INC.
HYDE CONSTRUCTION COMPANY

by these presents do hereby jointly, severally and unconditionally agree to indemnify and reimburse the Sureties and each of them from and against any and all loss, costs, damages, expenses and attorneys' fees, and any and all liability arising, resulting, sustained or incurred, or which can or may arise, result from or be sustained or incurred by said Sureties, or any of them, by reason of having executed said bonds, or any bond or bonds required by said applicants and given by said Sureties, or any of them, in connection with the performance of said contract, or in making any investigation or investigations on account of any obligatiogs incurred under said bonds, or any of them, or any claim made or threatened in connection therewith, or in prosecuting or defending any action brought in connection therewith, or in obtaining any and all releases, or in enforcing any of the agreements herein contained with reference to said bonds.

Anything to the contrary in this instrument notwithstanding, the liability of each of the applicants and indemnitors to the Sureties shall be limited to the amount of money set opposite their respective names as follows:

Indemnitor	Amount of Obligation Assumed
R. B. TYLER COMPANY, INC.	UNLIMITED AS TO SURETY
HYDE CONSTRUCTION COMPANY	UNLIMITED AS TO SURETY

Third: Said applicants, as contractors, have entered into a joint venture agreement in connection with the performance of said contract and said applicants agree with the Sureties that prior to the execution of the bonds herein applied for, the applicants will deposit in an account or accounts carried in the name of said joint venture in a bank or banks designated by said joint venture and satisfactory to the Sureties, the sum of at least ($) Dollars, being per cent (%) of the estimated contract price, and further agree to deposit in said bank account or accounts all estimates and moneys received by said joint venture in connection with the performance of the said contract, or any matter relating thereto, and said applicants agree that they will not make any disbursement from said fund so deposited except for the purpose of paying necessary expenses and bills incurred in connection with the performance of said contract, without the consent in writing of the Sureties who shall have accepted under the bonds to be executed by them at least per cent (%) of the total liability of all the Sureties under said bonds.

Fourth: The Sureties shall have the right, and are hereby authorized, but not required:

(a) In the event of any abandonment or forfeiture of the contract guaranteed by said bonds, or any breach of said bonds, to take possession of the work under said contract, and at the expense of said applicants to complete or to contract for the completion of the same, or to consent to the reletting or completion thereof by the Obligee in said bonds;

(b) To adjust, settle or compromise any claim, demand, suit or judgment upon said bonds, or any of them, unless the applicants shall request the Sureties to litigate such claim or demand, or to defend such suit or to appeal from such judgment, and shall deposit with the Sureties at the time of such request, cash or collateral satisfactory to them in kind and amount to be used in paying any judgment or judgments rendered or that may be rendered, with interest, costs and attorneys' fees;

(c) To fill up any blanks left herein, and to correct any errors in the description of any of said bonds, or in said premium or premiums, or in any name or names, it being hereby agreed that such insertions or corrections, when so made, shall be prima facie correct.

Fifth: To assign, transfer and set over, and do hereby assign, transfer and set over to the Sureties, as collateral, to secure the obligations hereunder and any other indebtedness and liabilities of the applicants to the Sureties whether heretofore or hereafter incurred, such assignment to become effective as of the date of said bonds, but only in the event of (1) any abandonment, forfeiture or breach of said contract or of any of said bonds; or (2) of any breach of the agreements herein contained, or (3) of a default in discharging other indebtedness or liabilities when due, or (4) of any assignment by the applicants for the benefit of creditors, or of the appointment of a receiver or trustee for the applicants, whether insolvent or not, unless such receiver or trustee be removed within 10 days; or (5) of any proceeding which deprives the applicants of the use of any of the machinery, equipment, plant, tools, or material herein referred to, but only in the event of such proceeding interfering with the performance of the contract, namely: (a) all the right, title and interest of the applicants in and to all machinery, equipment, plant, tools and materials which are now, or may hereafter be about or upon the site of said work or elsewhere, for the purposes thereof, including materials purchased for or chargeable to such contract which may be in process of construction, on storage elsewhere, or in transportation to said site; (b) all the rights of the applicants in and growing out of said contract in any manner, or any extensions, modifications, changes or alterations thereof, or additions thereto; or in or growing out of said contract or said bonds; (c) all actions, causes of action, claims and demands whatsoever which the applicants may have or acquire against any subcontractor, laborer or material man, or any person furnishing or agreeing to furnish or supply labor, materials, supplies, machinery, tools, or other equipment in connection with or on account of said contract; (d) any and all percentages retained on account of said contract, and any and all sums that may be due under said contract at the time of such abandonment, forfeiture or breach, or that thereafter may become due.

Sixth: That liability hereunder shall extend to and include the full amount of any and all sums paid by the Sureties in settlement or compromise of any claims, demands, suits or judgments upon any of said bonds in good faith under the belief that they or any of them were liable therefor, whether liable or not, as well as any and all disbursements on account of costs, expenses and attorneys' fees, as aforesaid, which may be made under the belief that such were necessary whether necessary or not; provided, however, that the Sureties shall not settle any claim except in accordance with the provisions of Article Fourth, subparagraph (b) hereof.

Seventh: That in the event of payment, settlement or compromise, in good faith, of liability, loss, costs, damages, expenses and attorneys' fees, claims, demands, suits and judgments as aforesaid, an itemized statement thereof, sworn to by any officer of the Sureties, or any of them, or the voucher or vouchers, or other evidence of such payment, settlement or compromise shall be prima facie evidence of the fact and extent of the liability of the applicants, in any claim or suit hereunder, and in any and all matters arising between the applicants and the Sureties.

Eighth: That this obligation shall, in all its terms and agreements, be for the benefit of and protect any person or company, joining with the Sureties in executing any of said bonds as well as any company or companies assuming reinsurance thereupon.

Ninth: That separate suits may be brought hereunder as causes of action accrue, and the bringing of suit or the recovery of judgment upon any cause of action shall not prejudice or bar the bringing of other suits upon other causes of action, whether theretofore or thereafter arising.

Tenth: A representative of the Sureties shall have access at all reasonable times and places to the books and records of the said

Thirteenth: That the liability of the applicants hereunder shall not be affected in the event that any applicant signing this agreement is not bound for any reason or shall become released, and the liability of the applicants, and each of them, hereunder shall continue so long as the liability of the Sureties or any of them, under any of said bonds shall continue and until satisfactory evidence of discharge or release of any and all such liability shall have been furnished to the Sureties, and the Sureties shall have been fully reimbursed for all loss, costs, damages, expenses and attorneys' fees, arising, resulting, sustained or incurred by reason of having executed any such bond or bonds. It is agreed that should any provision of this application be unenforceable as a matter of law that such provision shall be considered as surplusage and in no way affect the other covenants and obligations entered into herein.

Fourteenth: That this application shall be binding upon the applicants and each of them, their and its successors and assigns.

Fifteenth: That this application shall be liberally construed so as to fully protect and indemnify each of the Sureties, its successors, assigns and reinsurers.

Sixteenth: That this application may be executed in any number of counterparts by the respective applicants, and all of such counterparts when executed by said applicants, or any of them, shall be considered together and shall be as valid and as binding on the said applicants, and each of them, as if all had executed the same instrument.

Seventeenth:

IN WITNESS WHEREOF THESE PRESENTS ARE EXECUTED THIS 25 DAY OF JANUARY, 1960.

Attest _____

R. B. TYLER COMPANY, INC.

BY: Gaines P. Wilson

Attest _____

Attest _____

HYDE CONSTRUCTION COMPANY

BY: R. W. Hyde Jr.

Attest _____

Attest _____

Attest _____

FOR ACKNOWLEDGMENT BY CORPORATE APPLICANTS

STATE OF
COUNTY OF Ky. } SS:

On this 25th day of January A. D. 19 60, before me, the subscriber, personally appeared XXXXXXXJefferson STATE AT LARGE

to me personally known, who being duly sworn, did depose and say that he resides in the City of Louisville Kentucky

(INSERT HERE NAME OF OFFICER WHO SIGNS FOR THE CORPORATION)

that he is the President of R. B. Tyler Co., Inc. the corporation described in, and which executed the within instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order; and the deponent further said that he is acquainted with Gaines P. Wilson, and knows that he is the

(INSERT HERE NAME OF OFFICER WHO SIGNS FOR THE CORPORATION)

of said corporation and that he subscribed his name to the within instrument by a like order of the said Board of Directors, and in the presence of the deponent.

Witness my hand and official seal.

_____

Notary Public - State At Large

On this day of A. D. 19, before me, the subscriber, personally appeared

to me personally known, who being duly sworn, did depose and say that he resides in

(INSERT HERE NAME OF OFFICER WHO SIGNS FOR THE CORPORATION)

IN WITNESS WHEREOF THESE PRESENTS ARE EXECUTED THIS 25 DAY OF JANUARY , 1960 .

Attest

R. B. TYLER COMPANY, INC.

BY: Gaines P. Wilson

Attest

HYDE CONSTRUCTION COMPANY

Attest

BY: R. W. Hyde Jr.

Attest

Attest

Attest

FOR ACKNOWLEDGMENT BY CORPORATE APPLICANTS

STATE OF
COUNTY OF Ky. } SS:

On this day of A. D. 19 , before me, the subscriber, personally appeared

XXXXXXXJefferson STATE AT LARGE

25th January 60 to me personally known, who being duly sworn, did depose and say that he resides in

(INSERT HERE NAME OF OFFICER WHO SIGNS FOR THE CORPORATION)

the City of Louisville Kentucky that he is the

of R. B. Tyler Co., Inc. the corporation described in, and which executed the within instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order; and the deponent further said that he is acquainted with Gaines P. Wilson, and knows that he is the

(INSERT HERE NAME OF OFFICER WHO SIGNS FOR THE CORPORATION) President

of said corporation and that he subscribed his name to the within instrument by a like order of the said Board of Directors, and in the presence of the deponent.

Witness my hand and official seal.

Notary Public

On this day of A. D. 19 , before me, the subscriber, personally appeared

to me personally known, who being duly sworn, did depose and say that he resides in

(INSERT HERE NAME OF OFFICER WHO SIGNS FOR THE CORPORATION)

the City of , that he is the

of the corporation described in, and which executed the within instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order; and the deponent further said that he is acquainted with , and knows that he is the

(INSERT HERE NAME OF OFFICER WHO SIGNS FOR THE CORPORATION)

of said corporation and that he subscribed his name to the within instrument by a like order of the said Board of Directors, and in the presence of the deponent.

Witness my hand and official seal.

STATE OF
COUNTY OF } SS:

On this day of A. D. 19 , before me, the subscriber, personally appeared

to me personally known, who being duly sworn, did depose and say that he resides in
(INSERT HERE NAME OF OFFICER WHO SIGNS FOR THE CORPORATION)

the City of , that he is the

of the corporation described in, and which executed

the within instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order; and the deponent further

said that he is acquainted with , and knows that he is the
(INSERT HERE NAME OF OFFICER WHO SIGNS FOR THE CORPORATION)

of said corporation and that he subscribed his name to the within instrument by a like order of the said Board of Directors, and in the presence of the deponent.

Witness my hand and official seal.

STATE OF
COUNTY OF } SS:

On this day of A. D. 19 , before me, the subscriber, personally appeared

to me personally known, who being duly sworn, did depose and say that he resides in
(INSERT HERE NAME OF OFFICER WHO SIGNS FOR THE CORPORATION)

the City of , that he is the

of the corporation described in, and which executed

the within instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order; and the deponent further

said that he is acquainted with , and knows that he is the
(INSERT HERE NAME OF OFFICER WHO SIGNS FOR THE CORPORATION)

of said corporation and that he subscribed his name to the within instrument by a like order of the said Board of Directors, and in the presence of the deponent.

Witness my hand and official seal.

FOR ACKNOWLEDGMENT BY INDIVIDUAL APPLICANTS

STATE OF MISSISSIPPI
COUNTY OF HINDS } SS:

On this 25th day of January A. D. 19 60 , before me, the subscriber, personally appeared ROBERT W. HYDE, JR

to me personally known, and known by me to be the person described in, and who executed, the foregoing instrument and acknowledged

same to be act and deed.

Witness my hand and official seal.

Mary E. Reed (Miss Mary Reed)
My Commission expires 5/18/62.

STATE OF
COUNTY OF } SS:

On this day of A. D. 19 , before me, the subscriber, personally appeared

to me personally known, and known by me to be the person described in, and who executed, the foregoing instrument and acknowledged

same to be act and deed.

Witness my hand and official seal

OF the corporation described in, and which executed the within instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order; and the deponent further said that he is acquainted with , and knows that he is the
(INSERT HERE NAME OF OFFICER WHO SIGNS FOR THE CORPORATION)
of said corporation and that he subscribed his name to the within instrument by a like order of the said Board of Directors, and in the presence of the deponent.

Witness my hand and official seal. _____

STATE OF
COUNTY OF } SS:

On this day of A. D. 19 , before me, the subscriber, personally appeared
(INSERT HERE NAME OF OFFICER WHO SIGNS FOR THE CORPORATION)
to me personally known, who being duly sworn, did depose and say that he resides in the City of , that he is the of the corporation described in, and which executed the within instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order; and the deponent further said that he is acquainted with , and knows that he is the
(INSERT HERE NAME OF OFFICER WHO SIGNS FOR THE CORPORATION)
of said corporation and that he subscribed his name to the within instrument by a like order of the said Board of Directors, and in the presence of the deponent.

Witness my hand and official seal. _____

FOR ACKNOWLEDGMENT BY INDIVIDUAL APPLICANTS

STATE OF MISSISSIPPI
COUNTY OF HINDS } SS:

On this 25th day of January A. D. 19 60 , before me, the subscriber, personally appeared ROBERT W. HYDE, JR

to me personally known, and known by me to be the person described in, and who executed, the foregoing instrument and acknowledged same to be act and deed.

Witness my hand and official seal.

Mary S. Reed (Mrs. Jno. C. Reed)
My Commission expires 5/18/62.

STATE OF
COUNTY OF } SS:

On this day of A. D. 19 , before me, the subscriber, personally appeared

to me personally known, and known by me to be the person described in, and who executed, the foregoing instrument and acknowledged same to be act and deed.

Witness my hand and official seal. _____

Date January 25, 1960

United States Fidelity and Guaranty Company
Baltimore, Maryland

National Surety Corporation
San Francisco, California

Gentlemen:

Re: Your Co-surety Bond Covering Contract $2,721,419.00—R. B. TYLER COMPANY, INC., & HYDE CONSTRUCTION COMPANY, A JOINT VENTURE

Favor: City of Shively, Kentucky
For construction of Sewage System for City of Shively, Ky., Contracts 1, 2, 3, 4, 5 & 6

Contract & Bond dated January 25, 1960

Attached is "Application for Performance and Payment Bonds and Indemnity Agreement" on Form No. 1 duly executed by R. W. Tyler Company, Inc., a Kentucky Corporation, Louisville, Kentucky and R. W. Hyde, Jr., an individual d/b/a Hyde Construction Company, Jackson, Mississippi.

In consideration of your executing as co-sureties the above described bond or bonds, I hereby agree as follows:

That the signing and furnishing of this letter obligates me to the terms and conditions of the enclosed "Application for Performance and Payment Bonds and Indemnity Agreement" on Form No. 1 just as though I were named as one of the applicants therein and my signature were duly affixed thereto.

Yours very truly,

/s/ E. E. Morgan
E. E. Morgan

Encl.

ADDENDUM J

BOOK 287—PAGES 477-547, INCLUSIVE

IN THE CHANCERY COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

No. 71,194

UNITED STATES FIDELITY AND GUARANTY COMPANY
Complainant

vs.

E. E. MORGAN
Defendant

DECREE

This cause came on this day for final hearing on the pleadings and oral and documentary evidence, and the Court having heard and considered the same, together with arguments of counsel, and being now fully advised in the premises, and having made certain findings and conclusions as set forth in its opinion, doth now order, adjudge and decree as follows:

1. That on July 23, 1965, this Court entered a final decree and money judgment in Cause No. 66,254 on the docket of this Court, which decree is recorded in Chancery Minute Book 261 at pages 130-136, inclusive, and a true copy of which is attached to this decree as Exhibit 1 and incorporated herein and made a part hereof. Said final decree was affirmed by the Supreme Court of the State of Mississippi on November 7, 1966, as shown by the judgment of that Court in Cause No. 44,074 on the docket of said Court and attached to the mandate of said Court issued to this Court on January 11, 1967. A true copy of said judg-

ment as set forth in said mandate is attached to this decree as Exhibit 2 and is incorporated herein and made a part of this decree.

2. That the final decree of this Court entered on July 23, 1965 in Cause No. 66,254 on the docket of this Court, as affirmed by the Supreme Court of the State of Mississippi is and continues to be and remain in full force and effect and has been duly enrolled pursuant to Section 1555, Mississippi Code of 1942. True copies of the bond applications and indemnity agreements referred to in paragraph 4 of said final decree of this Court in said Cause No. 66,254, and which were adjudged to be valid and binding obligations upon the defendants therein, including the present defendant, E. E. Morgan, and which said E. E. Morgan was adjudicated to be obligated to perform specifically, are attached hereto, incorporated herein and made a part of this decree as Exhibits 3 through 14.

3. By virtue of the aforesaid final decree of this Court, Exhibit 1 hereto, the defendant is obligated to reimburse, indemnify and exonerate complainant pursuant to the terms and provisions of said bond applications and indemnity agreements, Exhibits 3 through 14, and to exonerate and secure complainant against ultimate loss in the premises on account of the execution of the bonds described in said final decree. The defendant E. E. Morgan, has failed and refused to perform the obligations assumed by him under the terms of the aforesaid bond applications and indemnity agreements, has failed and refused to perform the obligations required of him by said final decree, and has failed, and refused to pay and satisfy the aforesaid money judgment against him in favor of complainant. Under and by virtue of said judgment and decree of this Court, the complainant has a substantive right to satisfaction of said money judgment out of the property and as-

sets of the defendant, and complainant has a substantive right of discovery from the defendant.

4. That the defendant, E. E. Morgan, has a considerable amount of money and of other legal and equitable assets and interests in real estate, oil, gas and other minerals, stocks of different kinds, securities and other personal property, either in his possession or held in trust for him by others, the situation, value and particulars of which are unknown to complainant and which complainant has been unable to discover by the issuance of legal process, including garnishments and execution, and in justice and equity, the same ought to be applied to the satisfaction of the aforesaid money decree in favor of complainant and in satisfaction of the other obligations assumed by defendant in the aforesaid bond applications and indemnity agreements. Complainant has made diligent efforts to collect said money judgment by the use of available processes at law but has not been able to do so. Complainant has sued out numerous writs of garnishment against persons believed to be indebted to defendant or to have assets of defendant in their possession, but said garnishment proceedings have not resulted in the collection of any substantial portion of the amount due from defendant on said judgment. Complainant has caused execution to be duly issued to the Sheriff of Hinds County, Mississippi, and such execution has been returned by said Sheriff "*nulla bona.*" Complainant has exhausted its remedies at law and is entitled to invoke the aid of this Court of Equity to enforce and collect said decree and judgment.

5. That the complainant is entitled to enlist the aid and assistance of this Court for the purpose of enforcing the aforesaid final decree of this Court and for the purpose of requiring the defendant, E. E. Morgan, to perform the obligations imposed upon him by the aforesaid bond ap-

plications and indemnity agreements and by the aforesaid final decree of this Court. Complainant is also entitled to enlist the aid, assistance and powers of this Court for the purpose of obtaining satisfaction of the aforesaid money judgment of this Court, including the appropriation and application of defendant's property to the satisfaction of said judgment.

6. The complainant is entitled to specific performance of the application and indemnity agreement relating to the Shively, Kentucky project, Exhibit 14 to this decree, and it is ordered, adjudged and decreed that the defendant, E. E. Morgan, is ordered, directed and commanded to furnish to complainant, within fifteen (15) days from the date of this decree, and to file with the Clerk of this Court in this cause, a financial statement showing the current financial position of defendant as of the date of September 3, 1965 and as of the date of this decree. Said financial statement shall be in the form and shall show in detail the information called for by the form attached hereto as Exhibit 15 and made a part of this decree.

7. That the defendant, E. E. Morgan, be and he is hereby ordered, directed and commanded to file with the complainant and with the Clerk of this Court, within fifteen (15) days from the date of this decree, a statement in writing setting forth the identity, status and location of all his assets and property of every kind, nature and description, and setting forth the name or names of any persons, firms, or corporations who may have custody or control of any of said assets or property, such statement to include, but not to be limited to, all goods, chattels, money, accounts, notes, bonds, mortgages, deeds of trust, contracts, securities, evidences of debt and choses in action, belonging to defendant or wherein he has any interest.

8. That a general receiver should be appointed to take possession, custody and control of all of the aforesaid as-

sets for the purposes hereinafter set forth, and it is ordered, adjudged and decreed that Frank J. Buchanan, of Meridian, Mississippi, be and he is hereby appointed receiver, with all the powers of a receiver in equity, to demand, receive and take possession of all the property and assets of every nature and kind belonging to defendant, E. E. Morgan, or in which said defendant has any interest, upon said receiver filing bond with the Clerk of this Court in the amount of $50,000.00, with sufficient sureties, to be approved by the Court, such bond to be conditioned for the faithful performance by said receiver of his duties as receiver. Upon the execution of such bond by the said receiver and the approval thereof by this Court, and upon his taking the oath of office as receiver, the Court will issue an order reciting that such receiver has appeared, given bond in the required amount, which has been duly approved, and that he has taken the oath of office and duly qualified as receiver.

9. It is further ordered that said receiver, Frank J. Buchanan, shall have full power and authority to demand, collect and receive all the outstanding debts, claims, assets and property of every kind and nature belonging to defendant, E. E. Morgan, or in which E. E. Morgan has any interest, with full power to institute, prosecute and defend in his own name or in the name of said E. E. Morgan, or otherwise, any and all claims, suits, or proceedings pertaining to or affecting the property, business, assets or affairs of the said E. E. Morgan, including but not limited to the right to institute and prosecute any and all claims or suits that said receiver deems necessary or proper in order to obtain possession of any of the assets of the said E. E. Morgan or in which the said E. E. Morgan has any interest. For said purposes, and subject to any lawful requirements of such other jurisdictions, states or foreign countries, said receiver is authorized and empowered t

file suits and proceedings in other jurisdictions or in other states or foreign countries. Said receiver is authorized and empowered to institute such actions as he may deem necessary or appropriate and to have the monetary judgment and decree heretofore rendered against defendant, E. E. Morgan, in Cause No. 66,254 enrolled as a judgment in any or all of the states of the United States of America, or in any foreign country, and to invoke and utilize all processes and procedures available in any of such states or foreign countries to impose a lien upon or to take possession of any of the assets of said defendant, E. E. Morgan, or of any property in which the said E. E. Morgan may have an interest, either directly or indirectly.

10. It is further ordered, adjudged and decreed that the defendant, E. E. Morgan, is hereby ordered, commanded and directed to assign, transfer, convey and deliver to such receiver all of the real, personal, or mixed property of said defendant, of every nature and kind, which is in his possession or subject to his control. Said defendant is further ordered, commanded and directed to assign, transfer and convey to such receiver all of defendant's right, title and interest in and to any such property which is not in defendant's possession or subject to his control but in which defendant has any interest.

11. It is further ordered that the defendant, E. E. Morgan, his agents, servants and employees, and any and all other persons confederating, associating or combining with him, and any and all other persons, firms or corporations having in their possession, custody or control, any assets or property belonging to the said E. E. Morgan, or in which he has any interest, are hereby restrained and enjoined from selling, assigning, transferring, delivering, negotiating, discharging, or otherwise encumbering or in any manner disposing of or interfering with any debts or

demands due to the defendant, E. E. Morgan, or any notes, accounts, securities, evidences of indebtedness or other choses in action due E. E. Morgan, whether in his possession or held by some other person, and also from assigning, transferring, or in any manner encumbering or disposing of any money, stock, or other property, real or personal, belonging to E. E. Morgan or in which he has any interest whatsoever, except to deliver and transfer the same to said receiver; provided, however, that this decree shall not prohibit any such person from collecting any lawful indebtedness due them or from the enforcement of lawful deeds of trust, mortgages, pledges or other security instruments held by them, or prohibit any sales thereunder.

12. It is further ordered, adjudged and decreed that said receiver be and he hereby is authorized and directed to take possession of all of the aforesaid assets and property of defendant, E. E. Morgan, and to hold the same subject to the further orders of this Court for the purpose of satisfying in full the aforesaid judgment and decree of this Court dated July 23, 1965, and the judgment of the Mississippi Supreme Court rendered in connection with the appeal thereof, and for the further purpose of placing complainant in funds with which to discharge its liabilities and obligations as surety on the bonds written in connection with the aforesaid bond applications and indemnity agreements, and to secure complainant against any ultimate loss in the premise.

13. Said receiver is authorized to demand, collect and receive all of said property, assets and money of defendant, E. E. Morgan, wherever found or situated in the State of Mississippi, and, subject to any lawful requirements of such other jursidictions, to demand, collect and receive all of such property, assets and money of defendant, E. E. Morgan, situated in other jurisdictions, and to hold the

same in his possession, custody or control until further order of this Court. Said receiver is hereby further authorized to do all things which may be incidental and necessary or convenient for the purpose of carrying into effect the objects of his receivership as hereinbefore set forth, including the employment of legal counsel, and said receiver is hereby required to keep a careful account of all moneys received and expenses incurred by him and to make report thereof to this Court from time to time, including an annual report thereof.

14. In the event that the defendant, E. E. Morgan, shall fail or refuse, within fifteen (15) days from the date of this decree, to execute and deliver a transfer, assignment and conveyance of all of his assets of every kind and nature to the receiver hereby appointed, as set forth in paragraph 10 hereof, then this decree shall operate as a conveyance and transfer to said receiver of all of such assets of defendant, E. E. Morgan.

15. That said receiver be and he hereby is authorized and directed, without unreasonable delay, to convert the property and assets of defendant E. E. Morgan into money, and to hold the same subject to the further orders of this Court; provided, however, that said receiver is not to sell any of the real or personal property of defendant without an order of this Court.

16. Within a reasonable time said receiver shall prepare and submit to the Court an inventory of the assets of the defendant, E. E. Morgan, that have come into his possession, and all moneys received by said receiver shall be deposited in some responsible banking institution, subject to further orders of this Court.

17. Upon actual receipt of personal property or assets by said receiver to an amount or value exceeding the sum

of $50,000.00, the receiver shall forthwith apply to this Court for an order directing the amount of the receiver's bond to be increased to such an amount as the Court may deem sufficient and appropriate under the existing circumstances.

18. After the said receiver has collected and taken possession of sufficient assets, property, and money of defendant E. E. Morgan to satisfy in full the aforesaid judgments against said defendant, and after a sufficient sum of money or quantity of assets has been set aside for the purpose of placing complainant in funds to discharge its liabilities and obligations as surety for the defendant, and for the purpose of securing complainant against ultimate loss in the premises, and after provision has been made for the payment of all costs and expenses of receivership, then said receiver shall promptly report such facts to this Court for appropriate order.

19. It is further ordered that said receiver may at any time apply to this Court for further or other instructions and for further powers necessary to enable said receiver to properly fulfill his duties.

20. The entry of this decree shall not affect nor prejudice the right of complainant to institute and prosecute other and further actions, in law or in equity, to enforce the provisions of the aforesaid applications and indemnity agreements and the final decree of this Court in Cause No. 66,254, dated July 23, 1965, or to enforce the provisions of this decree.

21. The Court hereby retains jurisdiction of this cause for all purposes, including purposes of enforcement of this decree and the making of any further orders that may become necessary. Any demand, notice, process, citation, or other documents which it may be necessary or

proper to serve upon or deliver to defendant in connection with this receivership or any further proceedings in this cause may be served personally upon or delivered to the defendant, E. E. Morgan, or upon any one of his attorneys of record, Vardaman S. Dunn, Charles Clark, or William H. Cox, Jr., and service of any such demand, notice, process, citation, or other document upon any one of said attorneys shall have the same force and effect as if service had been had upon Morgan personally.

ORDERED, ADJUDGED AND DECREED, this the 7th day of August, 1967.

/s/ Geo. Wm. Haynes
Chancellor

ADDENDUM K

BOOK 287—PAGE 608

IN THE CHANCERY COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

No. 71,194

UNITED STATES FIDELITY & GUARANTY COMPANY
Complainant

vs.

E. E. MORGAN
Defendant

ORDER

Came on this day to be heard the exceptions filed by the Defendant to the Final Decree dated August 7, 1967, and the Court having heard and considered said exceptions and finding that the same are not well taken and should be overruled and denied,

IT IS ORDERED AND ADJUDGED that said exceptions be and the same are hereby noted but the same are hereby overruled and denied.

SO ORDERED on this the 9th day of August, 1967.

/s/ Geo. Wm. Haynes
Chancellor

Filed Aug. 9, 1967.
Mrs. Charles A. Scott,
Chancery Clerk
By /s/ M. G. Beane, D.C.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 491

E. E. MORGAN,
Petitioner,

vs.

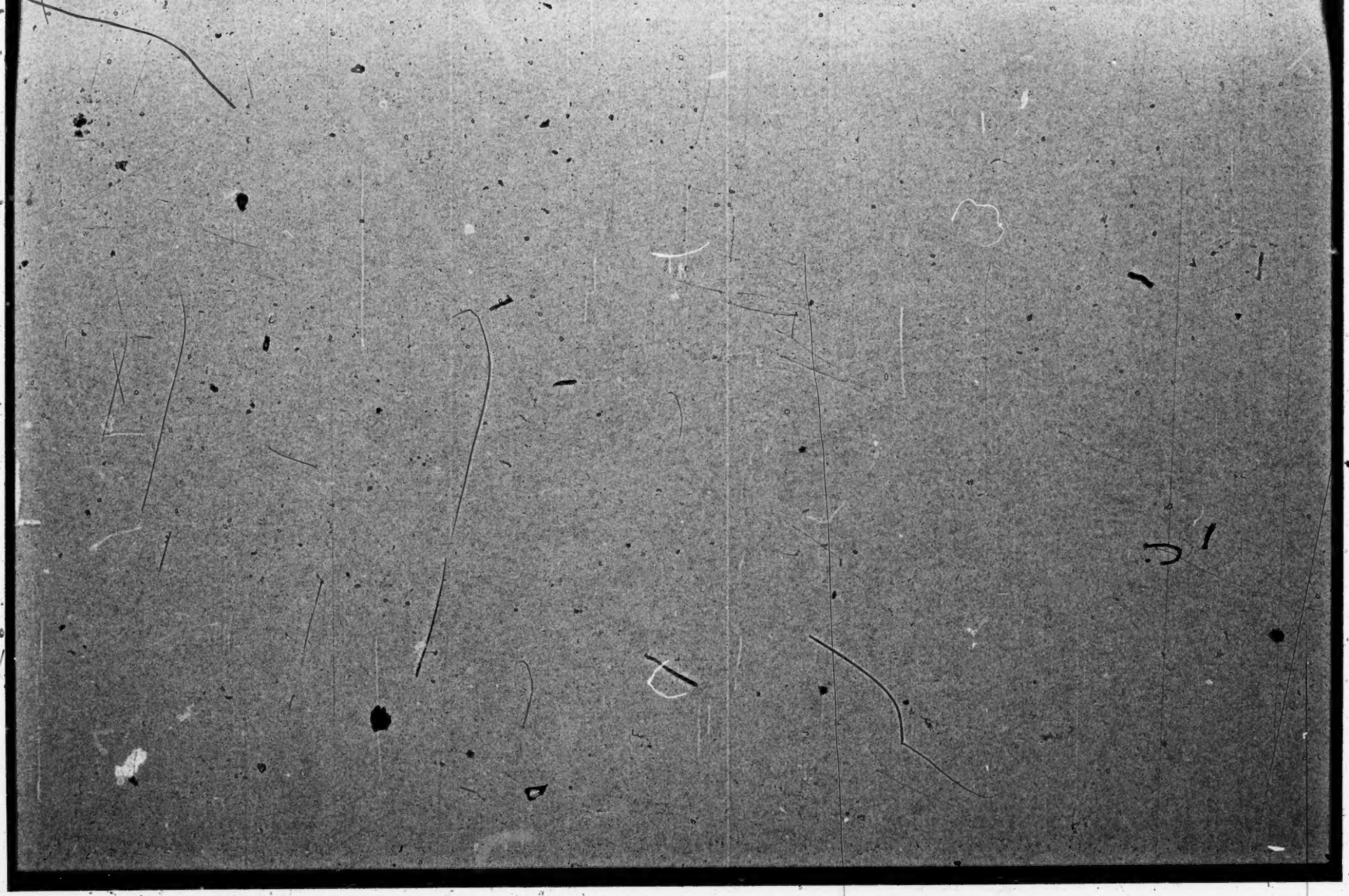
UNITED STATES FIDELITY AND GUARANTY COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

BRIEF OF RESPONDENT IN OPPOSITION

JOSEPH A. COVINGTON
Post Office Box 786
Meridian, Mississippi
JUNIOR O'MARA
Post Office Box 22567
Jackson, Mississippi
PHINEAS STEVENS
Post Office Box 22567
Jackson, Mississippi
Attorneys for Respondent

E. L. MUNDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106. HArrison 1-8080



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NOTE: Unless otherwise indicated, emphasis in matter quoted in this brief has been supplied.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. .....

E. E. MORGAN,
Petitioner,

vs.

UNITED STATES FIDELITY AND GUARANTY COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

BRIEF OF RESPONDENT IN OPPOSITION

OPINIONS BELOW

Respondent deems it necessary to correct certain omissions and inaccuracies in the petition concerning the opin-

ions below, and to refer to the opinion in a prior companion case ("the parent case"), in order that this Court may ascertain the grounds of the decree below.[1]

The present suit was brought to enforce a 1965 decree which had been affirmed by the Mississippi Supreme Court in 1966. The 1965 decree adjudicated that respondent, United States Fidelity and Guaranty Company (USF&G), is entitled to have petitioner Morgan specifically perform each and every obligation assumed by him under each of certain bond applications and indemnity agreements which he executed in favor of USF&G. In particular, the present suit sought to compel specific performance of Morgan's voluntary and express agreement to furnish to USF&G, upon request, financial statements showing his current financial position (R. 10).[2] The present suit was also in the nature of a judgment creditor's bill to obtain satisfaction of a money judgment against Morgan contained in that same 1965 decree.

The opinion of the trial court in the present case which is appended to the petition as Addendum A is not the opinion delivered upon the rendering of the decree sought to be reviewed, but is an opinion delivered in connection with a preliminary motion to require an answer to paragraph 8 of the bill of complaint. The opinions rendered in connection with the decree sought to be reviewed are not reported but appear in the certified record at pages 1134-1143, 1210-1211.

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1. The opinion of the Mississippi Supreme Court in the present case is reported as *E. E. Morgan* v. *United States Fidelity and Guaranty Company*, 222 So.2d 820 (Miss. 1969). A copy is attached to the petition as Addendum B. This opinion refers to the prior case as "the parent case." (Addendum B, p. A15). The opinion in the prior case is reported as *E. E. Morgan et al.* v. *United States Fidelity and Guaranty Company*, 191 So.2d 917 (Miss. 1966).

2. "R." references are to the certified record from the court below, "Pet." references are to the petition. "Pet. Addendum" references are to the addenda to the petition.

The decree of the Chancery Court in the present case is not reported, but the complete decree and all exhibits thereto appear in the record at pages 1145-1173. A copy (without exhibits) is attached to the petition as Addendum J.

JURISDICTION

Petitioner seeks to invoke jurisdiction under Title 28, U.S.C., § 1257(3), which relates to review by certiorari of final judgments of the highest court of a state.

Respondent submits that the judgment of the Mississippi Supreme Court, Addendum C to the petition, does not possess the requisite finality to support review by way of certiorari, since that judgment remands the case to the trial court for further judicial proceedings of a substantial nature and is not a final and effective disposition of all matters in controversy in the suit. The burden of establishing jurisdiction rests upon the petitioner, and any doubt as to the finality of the state court judgment should be resolved against jurisdiction. *Republic ~~National~~ Natural Gas Co.* v. *Oklahoma*, 334 U.S. 62, 71 (1948).

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions alleged to be involved are set forth in the petition at pages 3 and 4.

As hereinafter discussed in the argument, no constitutional provision or federal question was timely invoked as a defense to the claim for specific performance of Morgan's express agreement to furnish financial information.

QUESTIONS PRESENTED

Respondent takes issue with the statement of "Questions Presented" as formulated by petitioner. Accordingly, respondent restates the questions presented. Stated in the circumstances of this case, these questions are:

1. Petitioner Morgan is an experienced contractor and financier. In order to induce the respondent USF&G to bind itself as surety on performance and payment bonds that were required on numerous large construction projects in which petitioner Morgan was financially interested, Morgan executed bond applications and indemnity agreements whereby he voluntarily and specifically agreed to fully reimburse, protect, and indemnify USF&G against any loss whatsoever on account of its suretyship. He also expressly agreed to place USF&G in funds with which to pay claims, and to furnish to USF&G, upon request from time to time, financial statements showing his current financial position. Morgan withdrew large sums from these contracting operations as personal profits, but left numerous laborers and materialmen unpaid. USF&G called upon Morgan to perform his agreements, but he refused to do so and attempted to repudiate all of his agreements. As a result, USF&G was compelled to pay huge sums on account of its suretyship. USF&G brought suit [the parent case] against Morgan to enforce his agreements. In that suit the courts decreed that Morgan was obligated to perform specifically each and every obligation assumed by him under each of his agreements, and also awarded a money judgment in favor of USF&G. Nevertheless, Morgan persisted in his refusal to perform his obligations, refused to furnish financial statements, and attempted to place his assets beyond the reach of USF&G. Thereupon USF&G brought the present action.

The principal question is whether, under these circumstances, Morgan is entitled to invoke the Fifth Amendment as an excuse for refusing to furnish to USF&G written statements disclosing his assets and current financial position.

2. Stated differently, the question is whether the evidence is sufficient to support the Mississippi court's holding that, under the particular facts of this case, Morgan is bound to disclose his assets to USF&G and is precluded by waiver and estoppel from refusing to do so on the asserted ground of possible self-incrimination, the finding of waiver and estoppel being based on Morgan's voluntary and express agreements and his conduct that would make it unjust, inequitable and unconscionable to permit him to invoke the privilege as an excuse for refusing to furnish written statements disclosing his assets and current financial position.

3. Whether Morgan has waived the privilege by failure to timely invoke it as a defense to specific performance of his express agreement to furnish written statements showing his assets and current financial position.

4. Alternatively, if Morgan has not waived or is not estopped to invoke the privilege, whether Morgan is exposed to any real and substantial hazard of incrimination by merely furnishing written statements disclosing the nature, situation, description and character of his assets.

5. Where a receiver is appointed to enforce a prior decree and overcome fraudulent actions of a recalcitrant defendant, does the Constitution require that the receiver be a completely disinterested person, or may the court, in the exercise of its discretion, select as receiver a well qualified former employee of the creditor, who is familiar with the intricate facts involved, who is required to post adequate bond, and who will act under the supervision of the court in enforcing the decree?

STATEMENT OF THE CASE

This case was decided on the special facts and circumstances reflected by the record. The decision of the court below is not a mere holding that there was a technical "waiver" of the privilege by contract. The court below has applied basic principles of *estoppel* in holding that Morgan is precluded from asserting the privilege (Pet. Addendum B, pp. A26, A33).

The petition studiously avoids coming to grips with the facts which create an estoppel. Furthermore, the petition incorrectly describes the relief granted by the decree below. Contrary to petitioner's repeated assertions, the decree does not direct any "sweeping testimonial discovery under oath." (Pet. p. 19). The decree merely directs the furnishing of written statements showing certain specified information concerning Morgan's current financial position. The decree does not specify that these statements be under oath.

Since an understanding of the facts is essential, we briefly restate the facts.

Some of the background of the present case appears in the opinion of the Mississippi Supreme Court affirming the 1965 Chancery Court decree in the parent case. *Morgan* v. *USF&G*, 191 So.2d 917 (Miss. 1966).

As shown in that decision, R. W. Hyde, Jr. was an experienced contractor who had engaged in the contracting business for many years. Petitioner Morgan was an experienced contractor who had considerable financial resources and was experienced in financing various types of transactions (191 So.2d at 919).

Hyde wanted to expand his business and take on more and larger contracts, but did not have sufficient financial

standing and assets to enable him to obtain the necessary surety bonds for more and larger jobs. Accordingly, in order to increase their bonding capacity and enable them to take on more and larger jobs, Morgan and Hyde became partners and associates in the contracting business so as to add Morgan's assets and financial resources to those of Hyde (191 So.2d at 919).

Thereafter, by means of bond applications and indemnity agreements, Morgan and Hyde were able to induce USF&G to become surety on the performance and payment bonds that were required of Morgan and Hyde in connection with the numerous larger projects (191 So.2d at 919).

USF&G began writing bonds for Morgan and Hyde in 1958. In connection with these bond applications and indemnity agreements, Morgan furnished USF&G with his financial statements for the years 1956, 1957, and 1958 (R. 812-826). Each of these statements shows that Morgan had a personal net worth substantially in excess of $3,000,000.00.

In every instance, USF&G acted in reliance on the representation and agreement that the *combined* net worth and *combined* assets of Morgan and Hyde were bound and would be available for the protection and indemnification of USF&G. These representations and agreements induced USF&G to write surety bonds on numerous construction projects involving many millions of dollars (191 So.2d at 919, 923).

In regard to each and every bond, Morgan voluntarily and specifically bound himself to protect, reimburse, indemnify and exonerate USF&G from any loss whatsoever on account of its suretyship. He also expressly agreed to place USF&G in funds with which to pay creditors on the projects (191 So.2d at 923; R. 799, Ex. C-15).

All of the agreements provided that they were binding on Morgan, his heirs, successors and assigns, and that the agreements should be "liberally construed" in favor of USF&G.

In connection with a large project in Shively, Kentucky, Morgan expressly, specifically and personally bound himself to furnish USF&G financial statements showing his current financial position, when requested to do so. The Shively application provided that each applicant would:

> "furnish to Sureties, upon request and at such reasonable intervals of time as sureties may designate, financial statements showing the current financial position of the applicant of whom such request for a statement is made." (R. 7-8).

The Shively application also provided that it should be "liberally construed so as to fully protect and indemnify" USF&G.

In order to induce USF&G to become surety on the Shively project, Morgan not only signed a printed form of indemnity agreement, but he also wrote and personally signed a letter in which he individually bound himself to all the terms and conditions of the Shively application "just as though I were named as one of the applicants therein and my signature were duly affixed thereto." (R. 799, Ex. C-15).

This letter is quoted in full in the opinion of the Mississippi Supreme Court (Pet. Addendum B, p. A32).

All of these agreements were signed by Morgan in order to pledge his assets to the indemnification of USF&G so as to induce USF&G to become surety. The very purpose of Morgan's business association with Hyde was to induce USF&G to become surety (191 So.2d at 919). In every instance USF&G *acted in reliance upon* Morgan's uncondi-

tional representation and agreement that his assets would be available for the protection and indemnification of USF&G (191 So.2d at 923).

From these contracting operations, Morgan withdrew more than $500,000 in cash, plus $316,000 in notes, which he still retains as profits from this venture (191 So.2d at 919). Yet when claimants on the projects began making demand for payment, Morgan not only refused to pay them, but he refused to place USF&G in funds with which to pay them, and he further refused to furnish USF&G with statements showing his financial position. USF&G made repeated requests for such financial statements prior to obtaining the 1965 adjudication against Morgan. Morgan has still not furnished such statements.

Consequently, USF&G was required to pay out vast sums and to resort to litigation in an effort to compel Morgan to do that which he had voluntarily agreed to do. USF&G brought suit against Morgan and Hyde and certain corporations controlled by them, and recovered a final decree on July 23, 1965. The 1965 decree expressly adjudicated that Morgan and the other defendants were obligated "to perform specifically each and every obligation assumed by them under the terms of each of the various bond applications and indemnity agreements signed by them." (R. 18). This 1965 decree also awarded money judgments in various amounts against the several defendants.

Hyde and his corporations admitted liability and did not appeal from the 1965 decree. Morgan and his corporations did appeal, but the Mississippi Supreme Court held that there was no merit in the appeal and unconditionally affirmed the 1965 decree (191 So.2d at 917, 924). Hyde made a full disclosure of his assets to USF&G. However, Hyde had no substantial assets, because Morgan had previ-

ously taken over virtually all of Hyde's assets (R. 1128).[3] Morgan, on the other hand, continued a deliberate course of conduct designed to place his assets beyond the reach of USF&G (R. 1136).

For a time, Morgan absented or concealed himself so that he could not be served with process.

After Morgan returned to Mississippi and could be served with process, in January 1967, USF&G filed the present suit (1) to enforce the prior decree of July 23, 1965; (2) to enforce specific performance of Morgan's agreement to furnish USF&G with financial statements showing his current financial position; (3) to compel Morgan to disclose his assets; and (4) to obtain other equitable relief, including the appointment of a receiver (R. 6-30).

Paragraphs 3 through 7 of the present complaint related solely to the enforcement of the prior decree and the compelling of specific performance of Morgan's obligation to furnish financial statements showing his current financial position (R. 6-10). Morgan did *not* invoke the privilege against self-incrimination as a purported defense to this part of the complaint. He merely denied that he was required to furnish such financial information, contending that specific performance had been denied in the prior case and that such denial was *res judicata* (R. 520-524 and 48-52).

The next paragraph of the complaint, paragraph 8, averred that Morgan had concealed substantial assets and resorted to other devices for the purpose of hindering, delaying and defrauding USF&G of its rights as a judgment creditor (R. 11). Morgan's answers did invoke the priv-

3. The opinion of the Mississippi Supreme Court states: "Hyde surrendered all assets which had not been taken over by appellant [Morgan]." (Pet. Addendum, B, p. A21, footnote).

ilege as to a portion of paragraph 8 of the complaint (R. 524-525, 628-629).

A preliminary hearing was held to determine the claim of privilege. The Chancery Court ruled that Morgan was bound by contract to inform USF&G of the "nature, value, amounts, and whereabouts of his assets" and that he was estopped to refuse to make such disclosure (R. 646, 640-641, Pet. Addendum A, pp. A12 and A8). However, the Chancellor also ruled that Morgan would not be required to answer those particular averments of paragraph 8 of the complaint which charged him with concealment of assets and other fraudulent devices (R. 646-647, 649-651, Pet. Addendum A, pp. A12-A13).

Subsequently, the case was tried on the merits. Morgan could not be found for service of a subpoena and did not appear or testify. USF&G presented detailed evidence which strongly indicates that Morgan owns or controls several million dollars worth of liquid assets, consisting of cash, bearer bonds and negotiable securities—assets that are easy to conceal and difficult to find. The uncontradicted proof showed that, despite diligent efforts, USF&G had been unable to locate any substantial assets of Morgan.

At the conclusion of the trial, on August 7, 1967, the Chancery Court entered a final decree in favor of USF&G (R. 1045-1173, Pet. Addendum J). Paragraphs 6 and 7 of this decree adjudicated that USF&G was entitled to have Morgan specifically perform his agreements and directed Morgan to furnish USF&G with financial statements in a specified form and a written statement showing certain specified information in regard to his assets and current financial position.

The decree also appointed a general receiver to demand, collect and receive all of the assets of Morgan for the purpose of enforcing compliance with the 1965 decree.

After the final decree had been entered, Morgan filed "Exceptions to Final Decree" (R. 1181-1184, Pet. Addendum J). Among other things, Morgan sought to invoke the privilege as to paragraphs 6 and 7 of the decree. As stated above, Morgan's pleadings had not previously invoked the privilege as a defense to enforcement of the prior decree and specific performance of his obligation to furnish financial information. After hearing, the exceptions were overruled (R. 1186).

Pending appeal to the Mississippi Supreme Court, Morgan obtained a stay of paragraphs 6 and 7 of the decree (R. 1187).

On appeal, on April 14, 1969, the Mississippi Supreme Court affirmed the decree of the Chancery Court in all respects and remanded the cause to the Chancery Court for "further proceedings in accordance with that Court's aforesaid decree of August 7, 1967." (Pet. Addendum C, pp. A37-A38).

Rehearing was denied on June 9, 1969.

On June 24, 1969, Morgan obtained from the court below a further stay of the enforcement of paragraphs 6 and 7 of the decree, pending the filing of a petition for certiorari in this Court.

SUMMARY OF ARGUMENT

I.

A. The Court below has held that under the particular facts of this case, Morgan is barred and precluded from asserting the privilege against self-incrimination as an excuse for refusing to furnish to USF&G written statements disclosing his assets and financial position, as he had expressly and unconditionally bound himself to do.

This holding is based upon *all* the facts of this case, including Morgan's specific agreements and his affirmative acts and conduct which make invocation of the privilege unconscionable.

The decision below does not turn upon a finding that there has been a technical "waiver" by contract. Instead, the court below has applied basic principles of estoppel and waiver announced in numerous prior decisions of this Court.

Estoppel and waiver have often been applied by this Court to bar inequitable assertion of constitutional rights in civil cases. Estoppel or waiver may result from a deliberate election, or from a course of conduct inconsistent with the assertion of the right and rendering it unjust and inequitable to permit assertion of the constitutional right or privilege. *Shepard* v. *Barron*, 194 U.S. 553, 565, 568. Furthermore, estoppel or waiver may be applied to bar any constitutional right or privilege which is intended for the personal benefit or protection of the person as to whom the estoppel or waiver is claimed. Since the privilege against self-incrimination is a purely personal privilege intended for the sole benefit of the individual, it is subject to estoppel and waiver.

This Court has expressly held that rights under the Fourth and Fifth Amendments may be waived by a prior

contractual undertaking to furnish information, and the principles of that decision are applicable here. See *Zap v. U. S.*, 328 U.S. 624 (1946).

B. In addition to the estoppel and waiver discussed above, Morgan has waived the privilege by failure to timely invoke it as a defense to specific performance. The decree below enforces specific performance of Morgan's express agreement to furnish financial statements showing his current financial position. Morgan never invoked the privilege as an alleged defense to this relief until after rendition of a final decree. Failure to specifically invoke the privilege prior to final decree is deemed a waiver. *United States ex rel. Vajtauer v. Com'r of Immigration*, 273 U.S. 103, 113 (1927).

C. Although the court below found it unnecessary to discuss this point, the decree below is correct for the additional reason that Morgan is not exposed to any "real and appreciable" hazard of self-incrimination by merely furnishing written statements disclosing the amount, nature, description, and situation of his assets. At most, Morgan merely shows a remote and barely possible contingency that should not be suffered to obstruct the administration of civil justice.

D. In proceedings in the nature of a judgment creditor's bill, the appointment of a receiver is customary and almost a matter of course. Where the proceeding seeks to overcome wrongful actions by a judgment debtor and to recover property that has been wrongfully transferred or concealed, it is not necessary that the receiver be a neutral or indifferent party. The court, in the exercise of its discretion, may appoint a competent and qualified agent of the creditor, who is familiar with the facts of the matter and is required to act under the supervision of the court in enforcing the decree.

II.

The decision below is in full accord with prior decisions of this Court. The cases relied upon by petitioner are readily distinguishable. None of them involved express and unconditional agreements of the type that are involved here. None of them involved affirmative acts and the other elements of estoppel that are present here.

ARGUMENT

The decision in this case is based on the peculiar and unique facts involved, the lower court has correctly decided the issues, and no amount of twisting and distorting can convert this case into one warranting review by this Court on certiorari. The alleged federal questions raised by petitioner have been decided in full accord with the applicable decisions of this Court.

The petition seeks to leave the impression that this is purely and simply a case in which a party has recovered a money judgment and then sought to enforce the judgment by post-judgment proceedings charging the other party with a crime. That argument is incorrect and misleading.

This is an unusual civil case involving the orderly enforcement of a prior judicial decree for specific performance and the fair administration of justice between private litigants. The present case involves special facts and circumstances that make invocation of the privilege unconscionable. As stated by the Mississippi Supreme Court, "The peculiar facts of this case are of particular import in considering the [claim of privilege]." (Pet. Addendum B, p. A26).

Contrary to Morgan's repeated assertions, the decision below is not based upon any alleged doubt as to the

applicability of the privilege in civil cases. Likewise, the decision is not based upon the ground that recognition of the privilege would impair what Morgan calls the court's "collection powers." Morgan's argument to that effect is a rank distortion of the court's opinion. That is obviously not the basis of the decision below, and a reading of the opinion will readily so demonstrate.

The court below was fully apprised of the governing federal law and based its decision on the facts of this case and the principles of estoppel and waiver established by prior decisions of this Court.

As heretofore shown, the background of the case is of utmost importance. Likewise, the particular relief sought and the particular relief actually granted are important.

Contrary to Morgan's assertions, the judgment of the court below does not involve any "interrogation" of petitioner. The court below has merely directed Morgan to furnish written statements disclosing information concerning his financial position. The decree does not even specify that these written statements be made under oath. The decree simply enforces the substantive property rights of USF&G which are derived from the voluntary and express agreements of Morgan and the court's prior adjudication that Morgan is bound to specifically perform his agreements.

As hereinafter discussed, the decision of the court below is clearly correct, is firmly supported by abundant authority, and accords with every principle of right, justice and fairness.

I.

The Decision Below Is Clearly Correct.

A. Petitioner Has Waived and Is Estopped to Assert the Privilege Because of His Voluntary Agreements and Course of Conduct.

The court below has correctly held that Morgan has waived and is estopped to claim the privilege as an excuse for refusing to disclose his assets to USF&G.

A landmark decision on the scope of the privilege in civil cases is *Brown* v. *U. S.*, 356 U.S. 148 (1958). There, this Court held that in *civil cases* the privilege is subject to limitations and that considerations of justice and fairness prevail in determining its scope and limits.

In *Brown*, the defendant had taken the stand in a civil case and testified on direct examination, but refused to answer relevant questions on cross-examination, invoking the privilege against self-incrimination. Although there was no express or intentional waiver of the privilege, this Court applied a rule of constructive waiver and rejected the claim of privilege. The Court stressed the unfairness and injustice to the other litigant and to the court that would result if the defendant were permitted to invoke the privilege. The Court said:

> "The interests of the other party and regard for the function of courts of justice to ascertain the truth become relevant, and prevail in the balance of considerations determining the *scope* and *limits* of the privilege against self-incrimination. . . ." (356 U.S. at 156).

In connection with the statement quoted above, the Court further said that indirect sanctions, such as striking the party's testimony, must often in practice be a poor

substitute for searching cross-examination. 356 U.S. at 156, note 5.

Thus, in *Brown*, this Court emphasized the importance of the fair administration of justice between civil litigants.

In the instant case, the Mississippi court has likewise stressed the public interest in subserving justice between private litigants. The Mississippi court said:

> " 'The interest of the general public in the fair adjudication by courts of civil disputes between citizens ranks very high in the American polity.' "[4]

In his petition, Morgan asserts that the decree required that he disclose his assets and that he transfer all of his assets to the receiver—that since he has executed an instrument conveying some property to the receiver, he may be subject to contempt proceedings if he discloses assets that he has not transferred to the receiver. Certainly there is no merit in this contention. The decree ordered *both* a disclosure of assets and a conveyance of assets. Morgan is not free to select one requirement of the decree, execute a document which is purportedly in compliance therewith, and then contend that, since the document he executed may be false, he cannot be required to perform the other requirements of the decree. We submit that a mere statement of this contention demonstrates its fallacy.

In the present case the Mississippi court has applied the firmly established rule that in civil cases constitutional rights may be waived or lost by estoppel. In accordance with settled law, the court below has held that the waiver or estoppel may be found because of an agree-

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4. Pet. Addendum B, p. A27, quoting *Duratron Corp.* v. *Republic Stuyvesant Corp. et al.*, (N.J. Super., 1967) 231 A.2d 854, 857, cert. den. by N.J. Sup. Ct. Nov. 14, 1967, 235 A.2d 897.

ment or because of a course of conduct that indicates an intention to forego the privilege. This holding is fully supported by the applicable decisions of this Court and the lower federal courts.

Thus in *Ralston* v. *Cox*, 123 F.2d 196, 198 (C.A. 5, 1941), cert. denied 315 U.S. 796, the court said:

> "If constitutional rights may be waived, *as is well settled*, they are also subject to the legal principles of *estoppel*. . . ."

Estoppel is particularly applicable when a litigant has so acted as to preclude him from asserting the right, that is, when to permit assertion of the right would give the litigant some undue advantage or result in wrong or injury to someone else.[5]

The Mississippi court has found that under the facts of the present case, recognition of the privilege would be unconscionable.

The Mississippi court has expressly relied on the principles announced in the leading case of *Shepard* v. *Barron*, 194 U.S. 553 (1904). In *Shepard* v. *Barron* this Court held that certain property owners had waived or were estopped to assert a denial of due process of law. The Mississippi court quoted from *Shepard* as follows:

> "Provisions of a constitutional nature, intended for the protection of the property owner, may be waived by him, not only by an instrument in writing, upon a good consideration, signed by him, but also by a course of conduct which shows an intention to waive such provision, and where it would be unjust to others to permit it to be set up. * * * 194 U.S. at 568, 24 S.Ct. at 742, 48 L.Ed. at 1120-21.
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> * * *

5. This Court has said that estoppel is based on the maxim that "no man may take advantage of his own wrong." *Glus* v. *Brooklyn Eastern District Terminal*, 359 U.S. 231, 232 (1959) (estoppel barring inequitable reliance on statute of limitations).

> ". . . A defense of this nature and upon these facts need not be placed entirely upon the strict and technical principles of an estoppel. While it partakes very strongly of that character, it also assumes the nature of a contract, implied from the facts * * *. It does not in the least matter what we may call the defense, whether it be estoppel or implied contract, or one partaking of the nature of both * * *." 194 U.S. at 565, 24 S.Ct. at 741, 48 L.Ed. at 1119 (Pet. Addendum B, p. A33).

In view of *Shepard* v. *Barron*, even Morgan is forced to concede that constitutional privileges may be lost by estoppel (Pet. p. 22). Morgan attempts to distinguish that case on the sole ground that it involved "affirmative acts" of the party and a constitutional provision protecting property rights, rather than the privilege against self-incrimination. We submit that the attempted distinction wholly fails.

Insofar as "affirmative acts" are concerned, the present case against Morgan is as strong a case as could exist. Morgan's agreements and representations are in writing and the facts are undisputed. Furthermore, as hereinafter shown, the vital principles of estoppel are clearly applicable to the purely personal privilege that Morgan inequitably seeks to invoke here.

This Court has often applied the principles of estoppel to bar inequitable assertion of constitutional rights. For example, in *Pierce Oil Corp.* v. *Phoenix Refining Co.*, 259 U.S. 125, 128, 129 (1922), involving an alleged denial of due process, the Court said:

> "There is nothing in the nature of such a constitutional right as is here asserted to prevent its being waived or the right to claim it barred, as other rights may be, by deliberate election or by conduct inconsistent with the assertion of such a right. . . ."

Likewise, in *Wall* v. *Parrott Silver & Copper Co.*, 244 U.S. 407, 412 (1917), in rejecting a claim that due process and equal protection of the laws had been denied, this Court said:

> ". . . There is no sanctity in such a claim of constitutional right as prevents its being waived as any other claim of right may be."

These cases announce a basic principle of constitutional law which is applicable to any constitutional right or privilege which is intended for the personal benefit or protection of the person as to whom the waiver or estoppel is claimed.[6] It is well settled that the privilege against self-incrimination is purely a personal privilege given to the individual solely for his own benefit. *Rogers* v. *U. S.*, 340 U.S. 367, 371 (1951); *Campbell Painting Corp.* v. *Reid*, 392 U.S. 286, 288 (1968). It necessarily follows that in civil cases the privilege may be waived or lost by estoppel.

We respectfully submit that there is nothing whatsoever in the nature of the personal privilege here asserted which would prevent its being waived, or the right to claim it barred, as other constitutional rights may be, by voluntary agreement or by conduct creating an estoppel.

It has never been doubted that the privilege against self-incrimination, like all other personal privileges, may be waived. Dean Wigmore states that the privilege may be waived by prior contract, and that *"This has been the doctrine since the origin of the privilege." Wigmore, Evi-*

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6. The cases are collected and the rule summarized in 16 C.J.S., *Constitutional Law*, § 89, p. 264, where it is stated:

> "Except when expressly prohibited by statute, *the right to assert a constitutional right or to challenge the constitutionality of a statute may be lost by waiver or estoppel if the constitutional right or provision involved is one which was made for the benefit or protection of the person as to whom the waiver or estoppel is claimed. . . .*" (p. 264).

dence (3rd Ed. 1940), § 2275, p. 435; and (1st Ed. 1904-1905), § 2275, pp. 3150-3151.

This Court has expressly held that constitutional rights under the Fourth and Fifth Amendments may be waived by prior contract. *Zap* v. *U. S.*, 328 U.S. 624 (1946), discussed *infra*. Similarly, the constitutional right of free speech that is involved in the right to strike and picket may be waived by a voluntary collective bargaining agreement containing a "no-strike" clause. *Alabama Cartage Co.* v. *International Brotherhood of Teamsters, etc.*, 250 Ala. 372, 34 So.2d 576, 579 (1948); *Shirley-Herman Co.* v. *International Hod Carriers, etc.*, 182 F.2d 806, 809 (C.A. 2d, 1950).

A highly pertinent decision of this Court is *Zap* v. *U. S.*, 328 U.S. 624 (1946).[7] In accordance with the rule that a person may waive constitutional provisions made for his own personal benefit, the *Zap* case holds that constitutional rights under the Fourth and Fifth Amendments may be waived by prior contract, even in a criminal case. In the present case the Mississippi court has stated that *Zap* involved a "strikingly similar situation." (Pet. Addendum B, p. A30).

In *Zap*, a contractor, in order to obtain business from the government, specifically agreed to permit inspection of his accounts and records. This Court held that *by making this agreement*, the contractor voluntarily waived any constitutional claim to privacy or immunity which he otherwise might have had with respect to business documents related to the contract. The agreement in *Zap* did not use the word "waive" and contained no reference whatsoever

7. Rehearing denied 329 U.S. 824, vacated on other grounds 330 U.S. 800. The "other ground" on which the decision was vacated was the absence of women on the grand jury which returned the indictment.

to either the 4th or 5th Amendments. Nevertheless, this Court found a "waiver" of those provisions. In *Zap*, Mr. Justice Douglas said:

> ". . . And petitioner's contract with the Navy Department provided: 'The accounts and records of the contractor shall be open at all times to the Government and its representatives, and such statements and returns relative to costs shall be made as may be directed by the Government.' (328 U.S. at 627).
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> * * *
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> "As we have pointed out in Davis v. United States, No. 404, decided this day, *the law of searches and seizures as revealed in the decisions of this Court is the product of the interplay of the Fourth and Fifth Amendments. But those rights may be waived.* And when petitioner, in order to obtain the government's business, *specifically agreed to permit inspection of his accounts and records, he voluntarily waived* such claim to privacy which he otherwise might have had as respects business documents related to those contracts. . . . (328 U.S. at 628).
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> * * *
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> ". . . *The waiver of such rights to privacy and to immunity as petitioner had respecting this business undertaking for the Government made admissible in evidence all the incriminating facts.*" (328 U.S. at 630).

To paraphrase the *Zap* case, we submit that when Morgan, in order to induce USF&G to become his surety, specifically agreed to indemnify USF&G, to place USF&G in funds with which to pay claims, and also specifically agreed to furnish financial statements showing his assets and current financial position, *he voluntarily waived any constitutional right to privacy or immunity which he otherwise might have had with respect to his assets and financial resources.*

As he did in the court below, Morgan continues to assert that *Zap* is based on the "required records" doctrine. This is simply not so. The plain language of the *Zap* decision makes it crystal clear that the holding is *not* based upon the "required records" doctrine. As shown by the above quotation, in *Zap* the Court emphasized that when the petitioner "specifically agreed" to permit inspection of his records, "he voluntarily waived" any claim to privacy and immunity (328 U.S. at 628). In the quoted statement the Court emphasized the *specific agreement* of the defendant and his *voluntary waiver;* and did not even mention the fact that any records were required to be kept.

Furthermore, if *Zap* had in fact been based on the "required records" doctrine, the Court could have disposed of the matter quite easily by merely citing *Wilson* v. *U. S.*, 221 U.S. 361, 380 (1911), a leading case on the "required records" doctrine. Instead, the Court deliberately stressed the specific agreement of the defendant. There can be no doubt that the author of the *Zap* decision was thoroughly cognizant of the *Wilson* case, because, in another decision handed down on the same day as the *Zap* case, that same Justice had cited and quoted that part of the opinion in *Wilson* that deals with the "required records" doctrine. See *Davis* v. *U. S.*, 328 U.S. 582, 589, 590 (1946).

Contrary to Morgan's argument, the principle of the *Zap* case is not confined to contracts with the government, but extends to any voluntary agreement which a person makes in order to induce another party to enter into a business contract with him. In *Zap*, the Court found a waiver because the defendant voluntarily signed a contract in order to obtain some business. There is nothing in *Zap* to indicate that a different result would have been

reached if the contract had been between two private individuals, and there certainly is no reason for making any such distinction.

We submit therefore that the *Zap* case is decisive on the question of waiver and estoppel.

It makes no difference whether the applicable principle be called estoppel, waiver, or express or implied contract. *Shepard* v. *Barron*, 194 U.S. at 568. All of these doctrines are used to denote the termination, preclusion, or loss of rights which a party might otherwise have had but for his actions.

If a party to a transaction induces another to act on a reasonable belief that he has waived or will waive certain rights, he will be estopped to insist on such rights to the prejudice of the one misled. *U. S. for Use and Benefit of Noland Co.* v. *Wood*, 99 F.2d 80, 83 (C.A. 4, 1938); *Glus* v. *Brooklyn Eastern District Terminal*, 359 U.S. 231, 232-234 (1959).

Similar reasoning was applied by Chief Justice Traynor of the California Supreme Court in holding that a privilege against disclosure may be waived by a prior contractual undertaking to furnish information upon request. *Crest Catering Company* v. *Superior Court*, 62 Cal.2d 274, 398 P.2d 150 (1965).[8]

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8. In *Crest* an employer had contracted to "furnish all necessary information" in regard to a welfare fund. The administrator of the fund sought disclosure of certain employment tax returns. By specific statute, these returns were privileged and immune from discovery. In holding that the privilege had been waived, the court said:

> "Crest contends that the foregoing provisions do not waive the privilege because there is no specific reference either to the code provisions creating the privilege or to the tax returns. *A waiver does not depend upon meeting such a brittle requirement.* . . .
>
> *"A waiver may occur (1) by an intentional relinquishment or (2) as 'the result of an act which, according to its natural import, is so inconsistent with an intent to enforce the right as to induce a reasonable belief that such right has been relinquished* . . ." (398 P.2d at 152).

We submit that the Mississippi court has correctly applied the rules of waiver and estoppel announced in prior decisions of this Court.

B. Morgan Has Waived the Privilege by Failure to Timely Invoke It As a Defense to Specific Performance of His Agreement to Furnish Financial Information.

In addition to the waiver and estoppel resulting from his affirmative acts and conduct, Morgan has waived the privilege by failure to timely invoke it as a defense to specific performance of his agreement to furnish financial information upon request.

As heretofore shown, it is undisputed that USF&G acted in reliance on the financial statements that Morgan voluntarily furnished to it and in reliance upon Morgan's unconditional agreements that his assets were bound for the protection and indemnification of USF&G.

It is likewise undisputed that Morgan has specifically *and unconditionally agreed to furnish USF&G with financial* statements showing his current financial position, when requested to do so. Morgan has also expressly agreed that this obligation shall be liberally construed. In the prior case, long before any claim of self-incrimination was ever mentioned by Morgan, the Mississippi Supreme Court adjudicated that this agreement is a valid and binding obligation which Morgan is bound to perform specifically. Morgan did not seek further review of the prior decision, and that adjudication has long since become final.

In the present case, Morgan's answers did *not* invoke the privilege as a defense to specific performance of this agreement. Morgan only pleaded *res judicata*, and the court below has correctly overruled that contention. At

no time prior to the entry of a final decree did Morgan ever invoke the privilege as a defense to the claim for specific performance.

The Chancery Court ruled that Morgan was under a contractual duty to make a written disclosure of the nature, value, amount, and whereabouts of his assets, and that whether this was done by way of discovery or by way of specific performance mattered very little (R. 1140).

On August 7, 1967, the Chancery Court entered its final decree. The only provisions of this decree that require Morgan to furnish any information are paragraphs 6 and 7 (Pet. Addendum J, p. A53). These paragraphs merely require that Morgan furnish to USF&G a financial statement in a specified form and a written statement showing the identity, status, location and custody of his assets. In order to be truly meaningful and actually disclose a party's current financial position, a financial statement must disclose full and correct information concerning the amount, nature, status, location and custody of his assets. USF&G therefore submits that paragraphs 6 and 7 of the decree merely constitute a grant of specific performance of Morgan's voluntary and express covenant to furnish financial statements and information correctly showing his current financial position.

After the final decree had been entered on August 7, 1967, Morgan filed exceptions to the final decree (R. 1181-1184, Pet. Addendum E), and thereby sought to invoke the privilege as an excuse for refusing to comply with the requirements of paragraphs 6 and 7 of the decree. USF&G submits that Morgan did not timely invoke the privilege as a defense to the relief granted in these paragraphs. Accordingly, Morgan is deemed to have waived the privilege. It is well settled that failure to specifically invoke the privilege prior to final judgment constitutes a waiver. *United*

States ex rel. Vajtauer v. *Commissioner of Immigration*, 273 U.S. 103, 113 (1927); *United States* v. *Murdock*, 284 U.S. 141, 148 (1931).

For this additional reason, the decision below is clearly correct and the petition should be denied.

C. Compliance with the Decree Does Not Involve Any Real or Substantial Hazard of Incrimination.

In recent decisions, this Court has repeatedly recognized that the "central standard" for the application of the privilege is whether the person claiming the privilege is "confronted by substantial and 'real' and not merely trifling or imaginary, hazards of incrimination." The privilege cannot be invoked unless the claimant is confronted by "substantial hazards of self-incrimination." *Marchetti* v. *U. S.*, 390 U.S. 39, 53, 61 (1968).

In the present case, the Mississippi court recognized the foregoing principles but ruled that it was not necessary to reach this question, because Morgan was precluded from invoking the privilege on account of waiver and estoppel. We submit, however, that the judgment below is correct for the reason that compliance with the decree does not involve any real or appreciable hazard of self-incrimination.

The only information that Morgan has been directed to furnish concerns the identity, status, location, and custody of his assets and property. From an early day, the courts have recognized that it is hardly imaginable that a party could be exposed to any real hazard of incrimination by merely disclosing the amount, nature, situation, description and character of his assets. *Bay State Iron Co.* v. *Goodall*, 39 N.H. 223, 235 (1859).

Kirtley v. *Abrams*, 184 F. Supp. 65 (USDC N.Y. 1960), involved a proceeding to discover and locate a judgment

debtor's assets. In rejecting a claim of privilege, the court pointed out that the defendant was not appearing before a grand jury, that no prosecutor or criminal investigation was involved, and that the constitutional protection "is confined to real danger, and does not extend to remote possibilities out of the ordinary course of law." The court emphasized that the activities of the judgment creditor were confined to a search for assets of the debtor for the purpose of satisfying the judgment. Applying the federal standards governing the privilege, the court concluded that the defendant was not confronted with any real and substantial hazard of self-incrimination.

The purpose of the present suit is not to compel Morgan to furnish incriminating evidence against himself in a criminal case, present or future, but to compel him to disclose assets that he has voluntarily and specifically bound himself to disclose. In the setting of the present civil case, Morgan is not exposed to any real or substantial danger of incrimination by merely making a written disclosure of his assets.

> "A merely remote and naked possibility . . . should not be suffered to obstruct the administration of justice." *Brown* v. *Walker*, 161 U.S. 591, 599, 600 (1861), quoting *Regina* v. *Boyes*, 1 Best & S. 311, 121 Eng. Reprint 730, 738.

D. The Appointment of the Receiver Was Correct and Proper. No Federal Question Is Presented by the Receivership.

Petitioner makes no serious effort to show that the receivership was erroneous and cites no authorities whatsoever on this point.[9] The opinion of the Mississippi Su-

9. In the court below, petitioner virtually abandoned any objection to the receivership. In one of his briefs on application for rehearing, petitioner stated:

> "Quite frankly, it is a matter of no great concern to appellant whether the Court places its stamp of approval on the receivership as presently constituted or not."

preme Court shows that no federal question in regard to the receivership was urged before or decided by that court. That opinion further shows that Morgan did not even present any persuasive authority to support his argument that the receiver should be a completely disinterested party. In expressly rejecting that contention, the court said:

> ". . . We note a lack of convincing authority to this effect." (Pet. Addendum B, p. A35).

Under all the authorities, the receivership was correct and proper. "The appointment of a receiver in proceedings upon a creditor's bill is a usual practice and is almost a matter of course when the object of the bill is to reach personal assets." 21 Am. Jur. 2d, *Creditors' Bills*, §90, p. 61; *Pittsburgh Equitable Meter Co.* v. *Paul C. Loeber & Co.*, 160 F.2d 721, 728 (C.A. 7, 1947).

In many cases it is absolutely necessary "for the Court to appoint a receiver to preserve, realize, administer or otherwise to appropriate the defendant's property to the satisfaction of complainant's judgment" or to take action to recover property which the defendant has "improperly encumbered, transferred, or alienated." *Clark on Receivers* (3rd Ed. 1959), §211, p. 323.

When a judgment debtor wrongfully conceals his property for the purpose of evading a prior decree, the receiver is not supposed to be indifferent or neutral, but his duty requires him to be the active adversary of the debtor. *Shainwald* v. *Lewis*, 8 Fed. 878, 879 (D.C. Cal. 1881), affirmed 48 Fed. 492 (C.C. Cal. 1881); *Clark on Receivers* (3rd Ed. 1959), § 115(a), pp. 167, 168; *Cahall* v. *Lofland*, 12 Del. Ch. 125, 107 A. 769 (1919).

In cases such as the present, the receiver is not appointed merely to preserve property *pendente lite*, but to recover and appropriate property. Accordingly, it is en-

tirely proper for the judgment creditor or his agent to be appointed as receiver. Likewise, it is proper for the receiver to engage the complainant's solicitor as his counsel. *Clark on Receivers* (3rd Ed. 1959) § 115(a), pp. 167-168; *Shainwald* v. *Lewis, supra*; *McPherson* v. *United States*, 245 Fed. 35, 41 (C.A. 6, 1917); *J. C. Turner Lumber Co.* v. *Toomer*, 275 Fed. 678, 680 (C.A. 5, 1921); *Boyd* v. *Brown*, 79 Colo. 568, 247 P. 181 (1926).

The debtor has no valid ground to complain of the appointment of a receiver. If the debtor has property subject to the payment of the debt, it ought to be applied to it. The purpose of the law in cases of this nature is to afford the largest and most thorough means of scrutiny to reach the property that ought justly to go to the discharge of the debt. *Coates Bros.* v. *Wilkes*, 92 N.C. 376, 380-381 (1885).

The foregoing principles are firmly supported by a wealth of authorities and petitioner cites no cases to the contrary.

As held by the court below, the selection of the receiver rests largely within the discretion of the Chancellor (Pet. Addendum B, pp. A35-A36).

We submit that the receivership is correct and proper in all respects, that the receiver has given adequate bond, the receiver must function under the direction and supervision of the trial court, and if, at any time, the receiver should act in excess of his powers, the defendant may apply to the trial court for appropriate relief in an appropriate proceeding.

The receivership does not present any federal question whatsoever. Most certainly it does not present any question warranting review by this Court.

II.

The Decision Below Accords with and Is Not in Conflict with Prior Decisions of this Court.

In a preceding subdivision of this brief we have shown that the decision of the court below correctly applies the rules of estoppel and waiver announced in prior decisions of this Court. See pages 17-26, *supra*.

In a strained effort to create a conflict of decisions, Morgan asserts that the decision below is based on Section 2275 of *Wigmore on Evidence* (McNaughton Revision 1961); that Section 2275 is based upon *U. S.* v. *Field*, 193 F.2d 92 (C.A. 2, 1951); and that *Field* is in conflict with *Curcio* v. *U. S.*, 354 U.S. 118 (1957). Thus Morgan implies that the decision below conflicts with *Curcio* (Pet. p. 5). This is an erroneous and misleading argument.

In the first place, the decision below is not based solely on Section 2275 of Wigmore but on the facts of this case and on the principles of estoppel and waiver laid down in cases such as *Shepard* v. *Barron* and *Zap* v. *U. S.*, heretofore discussed.

In the second place, the basic principles set forth in Section 2275 of Wigmore long antedate and are in no way dependent upon *Field*. In the very first edition of his work, which was published in 1904 and 1905, Dean Wigmore states that the rule announced in Section 2275 has been "*the doctrine since the origin of the privilege.*" *Wigmore on Evidence* (1st Ed. 1905), § 2275, pp. 3150-3151. The third edition of Wigmore (1940) is to the same effect.

The 1961 McNaughton edition of Wigmore merely cites the *Field* case in a footnote as being in "Accord" with the text. That footnote is based on the simple fact that an earlier edition of Wigmore (the 1940 edition) was cited with approval in *Field* at page 100 of 193 F.2d.

In the third place, Morgan neglects to inform the Court that *Curcio* did not in any way repudiate, criticize, or even mention the rule set forth in Section 2275. Morgan also neglects to inform the Court that *Curcio* did not mention, discuss, or in any manner approve the dissent in *Field*.

Furthermore, *Curcio* did not involve express written contracts such as those involved in the present case. *Curcio* did not involve affirmative acts and the other elements of estoppel that are involved here. *Curcio* merely involved the *implied* obligation of a *custodian of records* that results from his assumption of the duties of custodian.

Curcio involved criminal contempt proceedings resulting from a witness's refusal to give oral testimony at a grand jury investigation of union racketeering. The Court merely held that although a custodian of records could not invoke the privilege insofar as *production* of the records themselves was concerned, he could invoke the privilege in response to certain questions concerning the whereabouts of the records.

In *Curcio* the Government relied on one statement contained in *Field* at page 97 of 193 F.2d. That statement did not relate in any way to Section 2275. In response to the Government's contention, the Court in *Curcio* made the statement quoted at the top of page 25 of Morgan's petition. That quotation clearly and unmistakably shows that in *Curcio* the Court merely said that the cases cited in *Field* on page 97 of 193 F.2d "in which a *custodian* was compelled to *identify* records . . ." did not support Judge Clark's statement on page 97 of 193 F.2d to the effect that "questions pertaining to the location of the records were proper under the precedents."

The two Second Circuit cases referred to in footnote 6 of *Curcio* likewise dealt only with a *custodian's* duty to

give oral testimony concerning the location and contents of corporate records.

It is therefore crystal clear that *Curcio* does not in any way conflict with the decision of the Mississippi Court.

Curcio does not conflict in any way with the principles of estoppel and waiver established by the decisions of this Court and applied by the court below in the instant case. In no way does *Curcio* detract from the vitality and validity of *Shepard* v. *Barron,* and *Zap* v. *U. S., supra.*

Likewise, none of the other cases cited by Morgan is in conflict with the decision below. None of them involved voluntary express written contracts of the type that are involved here. None of them involved unconditional and express agreements to indemnify and to furnish financial information upon request.

In no case cited had a party to civil litigation bound himself by unconditional agreements and representations in order to induce action by the other party. None of the cases cited involved an estoppel resulting from affirmative acts of the party that would make recognition of the privilege unjust and unconscionable.

None of the cases cited is contrary to the decisions of this Court upon which the Mississippi court relied.

We submit that the court below correctly held that Morgan has waived and is estopped to invoke the privilege as an excuse for refusing to disclose his assets as he had voluntarily and unconditionally bound himself to do.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

JOSEPH A. COVINGTON
Post Office Box 786
Meridian, Mississippi
JUNIOR O'MARA
Post Office Box 22567
Jackson, Mississippi
PHINEAS STEVENS
Post Office Box 22567
Jackson, Mississippi

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 491

E. E. MORGAN,
Petitioner,

vs.

UNITED STATES FIDELITY & GUARANTY COMPANY,
Respondent.

REPLY BRIEF OF PETITIONER

CHARLES CLARK
1741 Deposit Guaranty Bank Building
Jackson, Mississippi

VARDAMAN S. DUNN
1741 Deposit Guaranty Bank Building
Jackson, Mississippi
Attorneys for Petitioner

Of Counsel:

COX, DUNN & CLARK
1741 Deposit Guaranty Bank Building
Jackson, Mississippi

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, HArrison 1-3030

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REPLY BRIEF OF PETITIONER

Petitioner's reply to the arguments first raised in the Brief in Opposition follows:

I.

Most of Respondent's arguments converge as an effort to isolate the present case on what is called its "peculiar and unique" facts and thereby to persuade this Court that the issues involved are not of national concern or of sufficient importance to merit the Court's review.

The "peculiar and unique" facts to which reference is made consist of the statement that Morgan induced the United States Fidelity & Guaranty Company to continue writing construction bonds by giving guarantees against

loss and that he profited thereby. This is then tied to the assertion that when losses occurred, Morgan evaded the assumed obligations by an alleged criminal concealment of assets which should have been exposed to the lien and reach of the money judgment ultimately obtained.

However, these statements and assertions, taken at full face value, do not serve to make this case peculiar or unique on its facts or to distinguish it from any other of thousands of familiar commercial transactions occurring every day.

The example of another familiar commercial transaction will serve to illustrate the far-reaching consequences of the precedent which would be set by the Supreme Court of Mississippi if its decision on the Federal question is allowed to stand.

Thus, if *A* endorses *B's* note and induces a commercial bank to make a loan, which it would not otherwise have made, *A* becomes obligated to make good the debt and save harmless the bank from loss by reason of *B's* default.

Failing to respond completely to this obligation, it is quite easy to characterize *A's* omissions as "unjust, inequitable and unconscionable." The thousands of such transactions which occur on every business day of every week are essentially no different in law from Morgan's guaranty in the present circumstances.

If the guarantor persists in non-payment, the creditor may reduce the debt to a judgment and avail itself of all of the processes afforded under law for its enforcement, such as garnishment, execution, receivership, transfer injunctions and even bankruptcy. Absent waiver, however, the guarantor, as a judgment debtor, cannot be compelled to discover allegedly concealed assets where concealment

is made criminal, because this additional aid to collection runs head-on into the guarantee of the Fifth Amendment.

If non-payment could amount to a waiver, then there could never be an effective invocation of the privilege in a civil collection proceeding. Certainly in the familiar example above cited the debtor would be entitled to remain silent when called upon for discovery of assets if concealment were made criminal. Indeed, this is the clear and unmistakable holding of this Court in *Arndstein* v. *McCarthy* (1920), 266 U.S. 34, 45 S.Ct. 16.

We have only to add one ingredient to the cited example in order to substantially equate every existing commercial transaction with the circumstances of the present case. The ingredient would take the form of a printed clause on the promissory note on which credit is extended to the effect that "the makers and endorsers of this note agree to furnish to the payee financial statements on request." Or a less subtle clause might be added to the effect that "the makers and endorsers of this note, in the event of a default, expressly waive all privileges against self-incrimination under the Fifth Amendment to the Constitution of the United States."

The question remains: May such a prospective waiver clause in a purely private commercial contract document be invoked against a claim of the Fifth Amendment privilege when the debtor is charged in a post-judgment collection proceeding with criminal concealment of assets for the purpose of evading a judgment lien? If so, then in like manner, ad infinitum, every obligation of one party to indemnify or pay money to another may contain the same stereotype clause nullifying Fifth Amendment privileges. This is the very thing that prompted Judge Jerome Frank*

*Dissenting in *United States* v. *Field* (CA 2, 1951), 193 F.2d 92.

to observe that if prospective waiver by contract is generally accepted:

> ". . . the sole practical effect of the constitutional privilege will be to add a few words to a contract. So the high hopes of Madison and his fellows, expressed in this Fifth Amendment privilege, will end up in a rubber-stamp contractual clause. . . . Before long, rubber-stamped out of existence, the privilege will be but a quaint item of antiquarian lore." (193 F.2d at 107).

And just as a promise in ordinary private commercial transactions to make future disclosures cannot be specifically enforced as against the privilege claim, so it is in the case at bar.

It is submitted that this situation is not changed by broad assertions, as here, of reprehensible conduct or criminal concealments. There would never be an occasion to invoke the privilege against coerced testimonial self-incrimination if the individual involved were not being charged or being exposed to a charge of such conduct.

The Mississippi Supreme Court's decision deals with no peculiar nor unique circumstances, but if allowed to stand, the precedent will create a major area of erosion of the Fifth Amendment. Respondent's argument is an obvious effort to divert attention from this erosive consequence by the device of stigmatizing Morgan so as to make his claim of the privilege as unpopular and as reprehensible as possible. Such situations are the ones where the need to uphold and recognize the claim of the privilege becomes the most critical. It is easy to subscribe to constitutional privileges which are popular and attractive; it requires a deeper sensitivity to basic constitutional principles when the assertion of rights offends the moral senses of the majority.

If the individual debtor were obliged to defend or even deny such charges, in order to counteract the stigma cast upon him and to prevent some sort of estoppel being constructed out of contract or conduct, then the privilege would be circumvented completely, because the testimonial contradiction of the charges would make full disclosure relevant and would indeed result in a waiver under the very decision upon which Respondent appears to rely, namely *Brown v. United States* (1958), 356 U.S. 148, 78 S.Ct. 622 (Resp. Br. p. 17)

II.

Respondent argues that "The decision below does not turn upon a finding that there has been a technical 'waiver' by contract. Instead, the court below has applied basic principles of estoppel and waiver announced in numerous prior decisions of this Court." (Resp. Br. p. 13).

However, the Court expressly eliminated principles of waiver and estoppel in the general and technical sense and placed its decision on "waiver by contract." This portion of the decision was prefaced by the following observation to this effect:

> ". . . In view of the terms of this application, appellant's letter acknowledging acceptance of such terms, and our prior opinion that the Shively agreement was a valid and binding instrument, we do not find it necessary to discuss whether or not the technical requirements of a waiver or estoppel were complied with. . . ." (222 So.2d at 831; Addendum p. A33).

In any event, there are no "basic principles of estoppel and waiver" apparent in this case apart from (1) the alleged breach of an agreement to pay losses and furnish financial statements, and (2) the alleged criminal transfer and concealment of assets. Therefore, it is apparent that there is nothing peculiar or unique in the facts of this case

up to this point by which it may be set apart from any other commercial transaction involving circumstances where one party fails to pay his contractual obligation and the creditor is unable to locate assets from which collection can be made. These circumstances have never heretofore been held to destroy the constitutional privilege against self-incrimination.

The "prior decisions of this Court" referred to in Respondent's argument apparently consists of the case of *Sheppard* v. *Barron* (1904), 194 U.S. 553, 24 S.Ct. 737, on which the Court below placed its sole reliance. This case was discussed and distinguished in Petitioner's original argument. No cited case involved the right to remain silent in the face of possible incrimination, nor did the Court in the *Sheppard* case construct an estoppel out of a prospective waiver under the terms of a private contract.

While the *Sheppard* case is authority for the broad generality that constitutionally based rights are subject to waiver and estoppel, the circumstances of the cited case are wholly foreign to those in the present case and bear no remote similarity. As Mr. Justice Frankfurter observed for this Court in *Hughes* v. *Superior Court of California* (1949), 339 U.S. 460, 70 S.Ct. 718:

> ". . . Generalizations are treacherous in the application of large constitutional concepts." (70 S.Ct. at 723).

III.

Respondent argues that "the decision below is not based upon any alleged doubt as to the applicability of the privilege in civil cases." Also, it is argued that "the decision is not based upon the ground that recognition of the privilege would impair what Morgan calls the court's 'collection powers'." It is said that Morgan's argument to that effect is a "rank distortion of the court's opinion."

The decision of the Supreme Court of Mississippi speaks for itself. The very core of the decision is found in that Court's language quoted below:

> "Judgments and decrees are entitled to proper respect when rendered and public policy requires nothing less. The citizenry of the state has the right to expect their orderly enforcement and surely the litigants, who have a direct personal or pecuniary interest in the outcome of a suit, have the basic right to demand the enforcement of the judicial processes. The effectiveness of our entire court system rests upon the court's ability to enforce its judgments; otherwise they would become mere 'scraps of paper' evidencing only the good intentions of the court, and reducing its orders and the attempted enforcement thereof to an exercise in futility. The thought pervades that the constitutional privilege is largely related to criminal prosecution, which is only to say that the government or state must prove its case against an accused without the aid of the accused's testimony, if he desires to invoke the privilege. However, in a civil proceeding we express doubt that it was ever intended that the privilege could be transformed into an affirmative device whereby a judgment debtor can effectively thwart the processes of the court. . . ." (222 So.2d at 832; Addendum p. A34).

The quoted language proceeds from a misreading of the case cited and relied upon, namely *Zap* v. *United States* (1946), 328 U.S. 624, 66 S.Ct. 1277, discussed and distinguished in Petitioner's original argument. It casts the privilege against self-incrimination expressly in doubt when invoked in a civil proceeding to collect a judgment, such doubt being spawned under the view that the constitutional plea interferes with the Court's collection or enforcement powers and threatens to make of its judgments "'mere scraps of paper'". There can be little question but that this viewpoint, expressed in the above quoted language,

predominantly influenced the Court below in rejecting the privilege plea. It is no less clear that the viewpoint thus adopted cannot stand against the Fifth Amendment right to remain silent when criminally charged in a civil action.

IV

It is argued that the privilege is not involved because "The decree does not even specify that these written statements be made under oath."

Petitioner has proceeded upon the assumption that any answer to the discovery decree in chancery relating to the transfer and location of allegedly concealed assets had to be under oath, and this for the simple reason that a waiver of the oath would have the effect automatically of waiving discovery. It is so established in this jurisdiction, as to which see *Palmetto Fire Ins. Co.* v. *Allen* (Miss., 1925), 141 Miss. 681, 105 So. 482.*

While Respondent's position has been noted with considerable interest, we have detected no expressed intent on the part of Respondent to abandon its insistence upon a discovery in chancery or to waive the oath. In any event, attempted coerced discovery in chancery, whether under oath or not, is subject to the claim of the constitutional privilege. 27 *C.J.S.*, Discovery, § 5b.

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*In the cited case the Court said:

". . . Under the equity practice proper, in the absence of statutes, it is necessary for the answer to be sworn to. The oath is the thing that makes the discovery evidence, and it is that which distinguishes it from a mere pleading. In the absence of statute providing otherwise, a bill of discovery cannot be taken pro confesso. 6 Am. & Eng. Enc. Pl. & Pr. 732. A bill for discovery cannot be maintained if it waives answer under oath, for a waiver destroys the adequacy of the answer as regards discovery and turns it into a mere pleading. 6 Am. & Eng. Enc. Pl. & Pr. 732." (105 So. at 483).

See also *Dodson* v. *Hutchinson* (Miss., 1927), 148 Miss. 640, 114 So. 736.

V

It is argued that Morgan failed to plead the privilege in opposition to the demand for a financial statement. But the record does not bear out this argument.

The Bill of Complaint alleged that the Complainant was entitled to discovery, as part of which it claimed the right to be furnished a financial statement. The former case had produced a money judgment and a general declaration in the final decree there entered that Morgan was obligated to perform his contractual agreements. But the former decree did not direct or enjoin that Morgan file a financial statement or make any other form of discovery or specifically perform anything.

The basis for the prayer of the present Complaint for a financial statement, as well as the prayer for discovery in general, was the allegation of criminal concealment of assets. Morgan plead the privilege against self-incrimination and denied Complainant's entitlement to the relief thus prayed for. Not until the decree was entered in the present case was Morgan specifically called upon and enjoined to furnish a testimonial financial statement and discovery of the details which could be used as evidence leading to prosecution for criminal concealment.

Detailed exceptions were filed immediately upon entry of the decree in the present case. These asserted again the right to remain silent, this time against the discovery directions mandated in the final decree, which included the furnishing of a searching financial statement in a specified form.

It is submitted that the privilege was fully claimed at each and every critical point in the case, both in the trial court and on appeal. The references to the record are contained in the Petition.

VI.

On the possible criminal involvement of Morgan surrounding the Chancery Court's mandatory transfer injunction, the violation of which could amount to criminal contempt, Respondent argues that Petitioner was not privileged to "select" one requirement of the decree and contend that he cannot be required to perform the other requirements

The answer is that there was no "selection" in the sense of anything voluntary. The transfer injunction was not prohibited by any constitutional right or guarantee. Morgan has never contended otherwise. He had no choice but to comply with the injunction. He purported to do so by executing a quitclaim transfer to the Receiver. The only choice was exercised by Respondent. It asked for the injunction, obtained it and accepted its fruits. Having done so, it stands in no position to say that Morgan may be coerced into a testimonial discovery which could tend to inoriminate for violation of the injunctive order for the conveyance of not some but *all* assets.

It is submitted that in no event can there be a waiver of the right to remain silent when exposure to criminal prosecution is involved, as here, on a criminal law passed after execution of the contract said to constitute the waiver. No court has ever before imposed waiver of the right to remain silent when exposed to prosecution under such an ex post facto law.

VII.

On the receivership due process point, the mere appointment of the litigant as receiver was not alone the basis for the objection. The objection was and is to granting to such a biased receiver the "broad visitatorial and inquisitorial powers" to be exercised in the Court's name as an

adversary, with only ex post facto supervision. Where a court, either directly or through its appointed agent, deliberately sets itself up as an adversary to one of the litigants before it, the judicial function is abrogated and due process of law in its most fundamental aspects is denied. The trial court had ruled that the Receiver "is not, and ought not to be, indifferent between the parties, since his duties require him to be the active adversary" of Morgan (R. 1477). That the Supreme Court of Mississippi below has sanctioned such a procedure is apparent from the statement of the questions presented, one being "The propriety of the appointment of appellee's agent with *broad visitatorial and inquisitorial powers*" (222 So.2d at 825; Addendum p. A21). The Court concluded with the observation that "the full powers of the receiver would be restored" (222 So.2d 833; Addendum p. A36).

The Receiver was an officer of the Court, and as such was at least a quasi-judicial officer. Yet he was admonished to act as an adversary. He was the alter ego of his employer, the United States Fidelity & Guaranty Company, which had a large pecuniary interest in the case. Certainly bias was evident. In the case of Courts, freedom from bias, prejudice and financial interest is a constitutional principle. Those acting for the Court in a judicial or quasi-judicial capacity "must not only be unbiased but must avoid even the appearance of bias." *Commonwealth Coating Corp.* v. *Continental Casualty Co.* (1968), 89 S.Ct. 337. See also: *Turney* v. *State of Ohio* (1927), 273 U.S. 510, 47 S.Ct. 437.

CONCLUSION

Never before has any court declined, as here, to respect a Fifth Amendment plea in a proceeding for discovery in aid of judgment creditors where enforced discovery could tend to incriminate, but the decisions are consistently, and without exception, to the contrary, as to which see especially *Arndstein* v. *McCarthy*, supra.

Never before has any court, as here, cast the constitutionally based privilege in doubt on the ground that to respect the privilege would serve to evade a civil judgment or impair the Court's collection powers or make of a civil judgment "mere scraps of paper." But the authorities, on the contrary, have heretofore consistently respected the privilege in collection proceedings.

Never before has any court, as here, found a waiver of a properly claimed Fifth Amendment privilege against testimonial self-incrimination in virtue of a purely private contract given prior to the advent of the occasion for invoking the privilege.

In only one case in the annals of legal history has a waiver been set against the privilege to withhold *testimonial* discovery on the basis of contract, even in the area of *public trust*, and this case, *United States* v. *Field*, supra, has been twice contradicted by the same court and finally rejected by the Supreme Court of the United States in *Curcio* v. *United States* (1957), 354 U.S. 118, 77 S.Ct. 1145.

It is submitted that a license should not be granted to rubber-stamp out of existence the constitutional privilege against self-incrimination by permitting circumvention on the basis of stereotyped contract clauses in private commercial contract transactions.

It is submitted that the Petition should be granted, and that the writ should issue.

CHARLES CLARK
1741 Deposit Guaranty Bank Building
Jackson, Mississippi

VARDAMAN S. DUNN
1741 Deposit Guaranty Bank Building
Jackson, Mississippi
Attorneys for Petitioner

Of Counsel:

COX, DUNN & CLARK
1741 Deposit Guaranty Bank Building
Jackson, Mississippi